

Military Mediation as Military Justice? Conjectures on Repairing Unit Cohesion in the Wake of Relational Misconduct

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Abstract

The use of a neutral party to intercede between two or more disputing parties with the goal of facilitating a mutually-acceptable resolution, settlement, or agreement—i.e., mediation—has never been critically evaluated as a possible procedure within the field of military criminal justice. This article explores whether mediation may march alongside orthodox criminal procedure—as it does in civilian jurisdictions—without undervaluing traditional philosophies that guide military justice, and without undermining traditional sources of prosecutorial authority: military commanders. Current military doctrine (both operational and legal) supports non-traditional problem-solving systems, of which mediation should be considered a part. Relation-based misconduct provides the most appropriate candidate of crime particularly ripe for mediation within

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military units, especially when framed against a genuine and historically-justifiable command interest in preserving or repairing "unit cohesion." While pragmatic and legal counter-arguments against mediation are reasonably sound, there is nothing intrinsic to the military scheme of justice that makes them any more persuasive. Rather, when translated into a military culture, these criticisms and concerns reflect the same underlying tensions between traditional prosecutorial authority, efficiency, victim rights, and preventive law. Ultimately, whether in the form of a system that directly employs mediation parallel to orthodox justice, or in the form of a new skill set for military leaders employed indirectly as part of their routine leadership functions, mediation need not be considered alien nor an anathema to current military justice as exercised by military commanders.

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I. OVERVIEW

Military justice has a distinct flavor, tone, and appearance from civilian criminal justice.¹ Traditionally, and for sound reasons, military justice is constructed around, and premised on, unilateral authority and hierarchical procedures. That is, decisions about who to prosecute, how to prosecute, or whether to prosecute are the responsibility of commanders rather than prosecutors or independent grand juries.² Even if not universally admired, the rationale driving this “command-centric”³ justice system is readily

¹ See, e.g., Manual for Courts-Martial, United States Part I (Preamble), ¶ I-1 (2008) [hereinafter MCM], (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States.”). One of the broadest criminal offenses in the Uniform Code of Military Justice is Article 134, which outlines fifty-two distinct specific and general intent crimes that contain the necessary element of “under the circumstances, the conduct of the accused was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.” See, e.g., UCMJ Article 134 (Disloyal statements), Article 134 (Debt, dishonorably failing to pay), or Article 134 (Self-Injury without intent to avoid service). These victimless crimes are crimes because they impugn the reputation and public image of the military services. See also Eugene R. Fidell, *Accountability, Transparency, & Public Confidence in the Administration of Military Justice*, 9 GREEN BAG 361, 362–63 (2006) (noting the contrast between “standing” civilian trial courts and military trial courts, observing that the absence of a permanent “clerk’s office” in the latter decreases public awareness and scrutiny of pending criminal dockets; also noting that the availability and ease of non-judicial punishment makes it a common sanction “typically shrouded from public view” and thus important information about misconduct, the offender, the victim, and the decision-making process are not readily transparent).

² Uniform Code of Military Justice art. 22–24, 26 (10 U.S.C. §§ 822–824 (2012)) [hereinafter UCMJ]; MCM, Rules for Court-Martial 303, 306, and 307 (2012) [hereinafter R.C.M.].

³ Fidell, *supra* note 1, at 364–65 (arguing for, *inter alia*, prosecutorial oversight of commanders’ disposition decision to dampen what he believes to be the inconsistencies and unfairness of “command-by-command disparities”).

understandable.⁴ To effectively command a military organization or unit, whose members comprise the legal jurisdiction of that commander, one must be charged with maintaining the internal discipline of that group. One cannot maintain such discipline without the authority and mechanisms to dispose of criminal matters efficiently and—if needed—under the adverse conditions of combat.

This article asks whether similarly-accepted principles can justify a commander's decision to abstain from exercising unilateral military justice—like nonjudicial punishment or pursuing courts-martial—in favor of a less-structured, multi-lateral dispute resolution process. Under what conditions might this be appropriate? Under what framework—if not traditional military justice—would such problem solving occur? This article suggests that broken unit cohesion is one condition and that a tailored blend of mediation systems—victim-offender (i.e., criminal) and administrative (i.e., employment-focused) mediation—provides that framework.⁵

Though different in context, both criminal victim-offender mediation systems and administrative mediation processes share common themes in their practical components and theoretical perspectives. These alternative forums of conflict resolution insert a neutral third-party mediator to facilitate the voluntary and direct contact between aggrieved parties to avert adversarial “relationship-busting”⁶ processes and consequences. Mediation's proponents and researchers have found its benefits to be both quantifiable and intangible: effective de-clogging of crowded court dockets,⁷ a less-

⁴ *Parker v. Levy*, 417 U.S. 733, 743–44 (1974) (observing that the “differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise’”) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

⁵ This article will focus on interpersonal conflict's damaging effect on unit cohesion as the justification for mediation. Other common justifications—e.g., cost-effectiveness or judicial economy—may also support this argument, but deserve their own thorough analysis as to whether they support mediation in a military justice context.

⁶ *Task Force on Improving Mediation Quality Final Report*, ABA SEC. OF DISP. RESOL., Appendix D at 32 (Apr. 2006–Feb. 2008), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/finaltaskforcemediation.aut_hcheckdam.pdf [hereinafter ABA DR].

⁷ Mark W. Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1485 (1993); Larysa Simms, *Criminal Mediation is the BASF of the Criminal Justice System: Not Replacing Traditional Criminal Adjudication, Just Making it Better*, 22 OHIO ST. J. ON DISP. RESOL. 797, 802–806 (2007). The Prosecution Resources Unit Mediation Program, run by the City Attorney's Office in Columbus, Ohio, estimates that “hundreds” of cases per year

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combative atmosphere than in-court litigation,⁸ emotional catharsis, cost-effectiveness, the preservation of relationships,⁹ satisfaction with the process,¹⁰ increased flexibility, and the shifting of responsibility for the process and outcome to those most affected by the dispute.¹¹ Of course, unconventionally resolving conflicts laden with legal implications that affect rights and duties—presumed attributes aside—bears its own challenges. Most notably, questions of traditional legal and ethical norms (whether they apply, whether they should be guides, or whether they should be avoided), considerations of fairness and due process, availability of representation, equal access to the process, finality, reviewability, confidentiality, impartiality, and asymmetric bargaining positions¹² are the recurring and oft-debated concerns raised about the purpose, design, and efficacy of mediation systems.

Despite mediation's well-researched dynamics in civil grievances and criminal cases,¹³ military criminal law academics and practitioners have largely ignored the question of its fitness for resolving service-member criminal misconduct under the Uniform Code of Military Justice (UCMJ). Instead, the military-specific legal literature abounds with analysis of

are successfully diverted from the city's criminal docket. See email from Robert S. Tobias, Senior Assistant City Attorney and Director, Prosecution Resources Unit, Columbus, Ohio, May 17, 2012, to the author (on file with the author). In 2011, the Department of Justice calculated that the use of Alternative Dispute Resolution (including mediation when appropriate) within its pending case-load across the United States saved 1,231 months of litigation effort (as defined by the number of months that cases would have remained docketed with federal courts had the dispute resolution process failed or not been initiated), and 14,656 days of attorney and staff time. See DEPARTMENT OF JUSTICE, OFFICE OF DISPUTE RESOLUTION, <http://www.justice.gov/olp/adr/doj-statistics.htm>.

⁸ Bakker, *supra* note 7, at 1480.

⁹ ABA DR Final Report, *supra* note 6, at 32.

¹⁰ Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1 W. CRIMINOLOGY REV. 1, at Table 9 (1998). See also Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 116–17 (2004).

¹¹ *What You Need to Know About Dispute Resolution: The Guide to Dispute Resolution Processes*, ABA SECTION OF DISPUTE RESOLUTION 1 (2006), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/draftprocedure.authcheckdam.pdf.

¹² See, e.g., Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEG. L. REV. 123, 126–29 (2008).

¹³ See generally Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667 (2005); Bakker, *supra* note 7.

mediation in civil disputes: contract and procurement processes, consumer and lessee complaints, and employee-employer conflict over equal opportunity and discrimination matters (generally, discussing civilian employees of the Department of Defense, not uniformed service-members subject to the UCMJ).¹⁴ This paucity of scholarship is coupled with the scarcity of practical application. Despite hundreds of documented victim-offender mediation programs in the United States alone,¹⁵ official presidential promotion of non-litigious dispute resolution systems within the

¹⁴ See, e.g., Colonel Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 3; Holly Cook, *Leader Development: Tactics, Techniques, and Procedures for Working with Union Employees*, ARMY LAW., Oct./Nov. 2002, at 13; John E. Hartsell, *The Sounds of Silence: Promoting Alternative Dispute Resolution in Air Force Procurement by Putting Confidence into Confidentiality*, 53 A.F. L. REV. 183 (2002); Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1 (1989); OTJAG [Office of The Judge Advocate General] Standards of Conduct Professional Responsibility Note, *Ethical Awareness*, ARMY LAW., Dec. 1991, at 58; Major Michael B. Richardson, *The Department of the Navy's Equal Opportunity Complaint Dispute Resolution Process Pilot Program: A Bold Experiment that Deserves Further Exploration*, 169 MIL. L. REV. 1 (2001); Captain Drew Swank, *Mediation and the Equal Employment Opportunity Complaint Process*, ARMY LAW., Sept. 1998, at 46; Major Timothy J. Tuttle, *Three's A Crowd: Why Mandating Union Representative at Mediation of Federal Employees' Discrimination Complaints is Illegal and Contrary to Legislative Intent*, 62 A.F. L. REV. 127 (2008); Major Sherry R. Wetsch, *Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys*, ARMY LAW., June 2000, at 8.

¹⁵ Mediation sessions, bringing together the victim and perpetrator of a crime, vary greatly in their sponsorship or point of origin: some are trial diversions screened by prosecutors' offices or redirected by courts; others are formed in the aftermath of punishment as part of conciliatory reconciliation triggered by parole offices; still others are generated by private civic or religious organizations under a philosophy of "restorative justice." See, e.g., *Mediation in Criminal Matters: Survey of ADR and Restorative Justice Programs* (sponsored by the ABA Criminal Justice Section, Section of Dispute Resolution, Section of State and Local Government Law, Standing Committee on Legal Aid and Indigent Defense, Government and Public Sector Lawyers Division, Commission on Domestic Violence, and Commission on Effective Criminal Sanctions), available at <http://www.americanbar.org/content/dam/aba/publications/criminaljustice/mediationsurvey.authcheckdam.pdf>. See also NATIONAL INSTITUTE OF JUSTICE, <http://www.nij.gov/topics/courts/restorative-justice/promising-practices/victim-offender-mediation.html>; VICTIM-OFFENDER RECONCILIATION PROGRAM INFORMATION AND RESOURCE CENTER, <http://www.vorp.com/articles/abaendors.html>.

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Executive Branch for the last three administrations,¹⁶ endorsement by the American Bar Association, and a statutorily-created Alternative Dispute Resolution Coordinating Committee within the Department of Defense,¹⁷ no such program, process, or even policy guidance exists to address mediation-ripe criminal misconduct in a population of more than two million uniformed members of the Armed Forces against the ever-present backdrop of the existing military criminal code.¹⁸ Whether mediation is consistent with, improves, or detracts from the unique culture and law of the UCMJ is a question currently unaddressed.

As explored below, the lack of attention mediation has received is not entirely surprising in light of the purpose and historical application of military criminal law focusing on expediency and discipline. It is even less surprising in light of a prosecutorial decision-making system that is self-consciously and deliberately commander-centric. Moreover, the class of interpersonal misconduct most apt for a mediated resolution usually fails to capture headlines or the necessarily-sporadic attention of uniformed officer-lawyers¹⁹ working within military justice. Instead, mass homicides on stateside installations or committed in a combat theater; hazing-related suicides; battlefield misconduct; purported race-based bias in the application of the death penalty; and intrinsic challenges in the prosecution of alleged sexual assaults are the military justice issues attracting the most attention from lawmakers, the public, and within the military.²⁰

¹⁶ See Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 34 WEEKLY COMP. PRES. DOC. 749 (May 1, 1998), available at www.opm.gov/er/adrguide/Appendix-p2-3.asp.

¹⁷ See 5 U.S.C. §§ 571–584 (2012), Pub. L. 104–320 (Administrative Dispute Resolution Act of 1996); see also www.adr.gov, and www.dod.gov/dodgc/lc/.

¹⁸ For statistical reporting on the Armed Forces' population, see "Population Representation in the Military Services: 2010" (Report of the Office of the Under Secretary of Defense, Personnel and Readiness), available at <http://prhome.defense.gov>. Generally, active duty members of the military are universally subject to the UCMJ's jurisdiction, regardless of territorial jurisdiction in which the crime occurs and regardless of whether the crime has a service connection. See, e.g., 10 U.S.C. §§ 802, 803, and 805 (2012); *Solorio v. United States*, 483 U.S. 435 (1987) (enlarging military jurisdiction, altering its basis from a service connection of the crime to a jurisdiction based solely on the military status of the accused).

¹⁹ Hereinafter, this article will refer to Judge Advocates as those uniformed members of the Armed Forces licensed to practice law in the United States and serving as legal advisors within their respective Services' Judge Advocate General Corps.

²⁰ See, e.g., Associated Press, *Pretrial Hearing Set for Fort Hood Shooting Suspect; Defense Requesting Another Expert*, WASH. POST, Apr. 2, 2012,

Yet, recurring threats to good order and discipline faced by the average military commander are not these attention-grabbing “black swan” events.²¹ Rather, they are the day-to-day grievances and interpersonal frictions between service-members that—if left untended—spark on various levels: harm to a victim, the punitive consequences on the perpetrator, and the time and effort drained from the command as it undergoes or leads an investigation and prepares for a court-martial or administrative action. Unit cohesion also weakens when interpersonal friction leads to what this article will refer to as “relation-based” or “relational” misconduct. As a fundamental corollary to a military commander’s charge to enforce good order and discipline, sustaining unit cohesion in the wake of relation-based misconduct is a military duty that could drive commanders toward non-traditional means, like mediation, for resolving this type of crime in the ranks.²²

At its core, carving out a distinct set of crime and labeling it as “relational misconduct” is nothing more than a common-sense observation that some interpersonal crimes disrupt the community in which the victim

http://www.washingtonpost.com/national/pretrial-hearing-set-for-fort-hood-shooting-suspect-defense-requesting-another-expert/2012/04/02/gIQAXY8CrS_story.html (regarding the mass shooting that resulted in 13 deaths and 31 wounded personnel on Fort Hood in November 2009); Kim Murphy, *Afghanistan Shooting Suspect Named: Army Staff Sgt. Robert Bales*, L.A. TIMES, Mar. 16, 2012, <http://www.latimes.com/news/nation/nationnow/la-na-nn-afghanistan-shooting-suspect-20120316,0,1113958.story> (regarding the alleged cold-blooded murder of more than a dozen Afghan villagers); Sgt. 1st Class Tyrone C. Marshall Jr., *Senior Enlisted Leaders Condemn Hazing in Military*, AM. FORCES PRESS SERVICE, Mar. 23, 2012, <http://www.army.mil/article/76366/> (regarding, in part, the Army’s response to the alleged hazing-related suicide of Private Danny Chen on October 3, 2011); Editorial, *The Military and the Death Penalty*, N.Y. TIMES, Aug. 31, 2011, <http://www.nytimes.com/2011/09/01/opinion/the-military-and-the-death-penalty.html>; Memorandum from The Judge Advocate General to Judge Advocate Legal Services Personnel, subject: Special Victim Prosecutors—Policy Memorandum 09-03 (29 May 2009), available at <https://www.jagcnet2.army.mil/852573690045C0BB/0/93AEBBB34AC5388585257809004DCB9A?opendocument> (on file with the author); Major General (Retired) Charles J. Dunlap, Jr., *Bad Policies Breed Bad Behavior in Modern Battlefield Situations*, THE PLAIN DEALER, Apr. 22, 2012, http://www.cleveland.com/opinion/index.ssf/2012/04/bad_policies_breed_bad_behavior.html.

²¹ NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* xxii–xxiii (2010) (defining a “black swan” event as an occurrence that is exceptionally rare (“a statistical “outlier”) yet carries “extreme impact” and for which human nature compels a sense of a “retrospective” predictability).

²² See, e.g., U.S. DEP’T OF ARMY, REG. 600–20, Army Command Policy ¶ 1-5c, 2-1, and 4-1 (18 Mar. 2008).

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and offender find themselves.²³ This realization, then, implicates a favored maxim within the philosophy of mediation: certain forms of non-traditional justice are normatively better-suited when all parties agree that the stakes and goals involve more than retribution, deterrence, or incapacitation of the offender.²⁴ Repairing military unit cohesion, then, is fundamentally comparable to the positive effects on workplace climate, employee satisfaction, and intra-community trust pursued by advocates of mediation.

With that as a premise, this article introduces two relative strangers to each other for the first time: mediation and military justice. The intent is modest: to explore the conditions under which these two adjudicatory paths may function side-by-side without breaching core tenets of traditional military justice. But, as scholars of mediation have noted, marrying up a dispute or conflict with a suitable venue or process can be a daunting challenge.²⁵ Viewing mediation as a stake-holder driven, risk managing “corrective measure,” notably within the customary discretion of commanders, this article will then examine that class of misconduct that might be ripe for mediation. It then offers a rationale—repairing unit cohesion—for justifying a commander’s choice to rely on mediation as an alternative venue for solving a disciplinary problem. To better frame this reconceptualization of what military justice *could* be, this article will demonstrate that both operational doctrine and current military criminal procedure are, in fact, permissive enough to allow for innovative exploration of unorthodox justice.²⁶

After discussing the strengths and weaknesses of various military-specific counterarguments, this article concludes with a brief look at how mediation might find its way into military justice through straightforward

²³ Bibas & Bierschbach, *supra* note 10, at 109.

²⁴ Gabriel Hallevy, *Therapeutic Victim-Offender Mediation Within the Criminal Justice Process—Sharpening the Evaluation of Personal Potential for Rehabilitation While Righting Wrongs Under the ADR Philosophy*, 16 HARV. NEGOT. L. REV. 65, 74 (2011).

²⁵ Frank E. A. Sander & Lukasz Rozdeicz, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 2 (2006).

²⁶ By first looking at the parties’ characteristics and goals, to include the obvious interests of the encapsulating military community, and only then searching for an appropriate forum, this tack follows Sander and Goldberg’s approach of “fitting the forum to the fuss” rather than the reverse. *Id.* at 6–7 (citing to Frank E. A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994)).

pedagogical means rather than through a systems-design approach. In the appendix, this article will propose several “tracks” in which mediation can be envisioned as a potential partner to orthodox military justice methods, as well as highlighting potential issues that are worth exploring in greater detail.

II. JUSTIFICATIONS

A. *Relational Misconduct*

Relational crime or misconduct is that class of military criminal offense that meets two criteria. First, an intrinsic feature of the relationship between the offender and the victim constitutes one or more factors triggering the commission of the offense. Second, the effect of the crime is limited to an emotional or physical injury to another service-member. Simply, both the cause and the effect of the misconduct are “relational.”

The purpose of defining “relational” crime in this way is to narrow the field of potential application to those areas in which mediation has the greatest opportunity for resolution. For instance, a crime whose only victim was—in a sense—the government (e.g., false official statements, obstruction of justice, dereliction of duty, fraudulent claims, absent without leave, to name a few) are foreclosed from this particular class of crime and would not be the proper subject of a mediated solution, at least as envisioned in this article. In contrast, minor assaults between roommates in the barracks,²⁷ insubordinate contempt or disrespectful language toward a non-commissioned officer,²⁸ dishonorably failing to honor a personal debt,²⁹ and communicating a threat³⁰ *could* be examples of such relational misconduct.³¹

²⁷ UCMJ art. 128 (2012). In particular, “simple assaults” and “assaults consummated by a battery” without punishment enhancers or aggravators. *See* MCM, pt. IV, ¶ 54b(1) and (2).

²⁸ UCMJ art. 91 (2012). *See* MCM, pt. IV, ¶ 15a(3).

²⁹ UCMJ art. 134 (2012). *See* MCM, pt. IV, ¶ 71.

³⁰ UCMJ art. 134 (2012). *See* MCM, pt. IV, ¶ 110.

³¹ Admittedly, this broad definition leaves several questions unanswered: it does not further define “emotional or physical injury,” so—arguably—it encompasses everything from an insulting word to a gunshot wound; it also does not purport to explain *how* to determine what the triggering factors are. These omissions are deliberate. I believe they are necessary in order to properly recognize the ultimate discretion afforded to commanders as decision-makers in military justice: allowing commanders (or their designees) the fundamental opportunity to determine whether the causes of the misconduct are relationship-centric, and thus potentially ripe for mediation. This

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One common denominator featured in all relational misconduct, and which offers a prospective rationale for choosing mediation in lieu of traditional justice, is the mark such crimes leave on a unit's sense of community. In other words, relational crime corrupts unit cohesion.

B. *Damaged Unit Cohesion: A Community Effect of Relational Misconduct*

As practitioners and scholars have found, crime disrupts communities.³² This disruption occurs not just in a macro, general welfare sense of crime's reputational effects on a community or its self-image, but also in that discrete sense. Relational crimes have fragmentary effects when committed within a social group of intricately tied members. Relational crime will undermine that social group's ability to complete common tasks, will diminish the quality and trust between interpersonal contacts, and will dissolve established bonds of social or professional dependency. As applied to military culture and organization, this community-fragmentation effect of relational crime is manifested by a weakened sense of unit cohesion.

The war-fighting need for muscular unit cohesion has been an observed truism of military life for millennia.³³ Cohesion, manifested by individual morale and unit-wide *esprit*, is "grounded in small group ties, [and] is crucial

reinforces the commander-driven military justice scheme. For example, it goes without saying that reasonable commanders will believe that some emotional and physical injuries are too grave in severity to side-step traditional criminal investigations and courts-martial; indeed, some relationship-centric causative factors may be critically outweighed by other causes, be they chemically-induced, or motivated by greed, revenge, lust, hatred, or have psychological roots. Nothing, however, about the scope of this definition, or the ensuing discussion about mediation, forecloses the commander's ability to make a judgment call about applying, or not applying, mediation in a given circumstance. Some simple, though plausible, examples of emotional harm in a military context include the erosion of the victim's self-confidence, disruption of routine, and anxiety, all of which axiomatically degrade unit cohesion when the victim and offender are tied together professionally and socially within the same unit. See, e.g., Hallevy, *supra* note 24, at 77.

³² Bibas & Bierschbach, *supra* note 10, at 109–10 ("crime also disrupts status relationships among offenders, victims, and communities," and noting that "crime and punishment are as much about social norms, social influences, and relations between persons as about individual blame and state-imposed suffering").

³³ Frederick J. Manning, Ph.D., *Morale and Cohesion in Military Psychiatry*, in TEXTBOOK OF MILITARY MEDICINE, PART I: WARFARE, WEAPONRY, AND THE CASUALTY—MILITARY PSYCHIATRY: PREPARING IN PEACE FOR WAR 2 (1994), available at

https://ke.army.mil/bordeninstitute/published_volumes/military_psychiatry/MPch1.pdf.

in enabling soldiers to persist in combat under conditions of extreme privation, fear and uncertainty.”³⁴ Despite wide recognition of this “crucial” element, often referred to as the “X factor” distinguishing successful combatants from the defeated,³⁵ its precise definition has never been firmly agreed upon by the many disciplines studying its nature and consequences. For example, it may have a significantly different meaning when studied in the context of small teams or large, multi-layered hierarchies; it may strongly affect individual behavior or group dynamics when viewed in the context of a unit undergoing combat conditions yet be weakly associated with performance in garrison, non-combat environments; it may be influenced by demographic or social factors in a civilian corporate organization that are non-existent in a military unit.

Ingraham and Manning, two scholars with a particular interest in the U.S. Army’s institutional emphasis on promoting unit cohesion post-Vietnam War and post-draft, defined it quite broadly as “feelings of belonging, of solidarity with a specifiable set of others who constitute ‘we’ as opposed to ‘them.’”³⁶

This definition reduces the concept, however, to a characteristic of group personality. Arguably, this misses (or at least obscures) the fundamental reason *why* military personnel are organized and socialized to be members of disciplined, unified, teams: the accomplishment of a military operation for which lethal force may be necessary to impart or suffer. Thus, more relevant definitions of unit cohesion expand its ambit to include not just individuals and the organization in which they function, but also consider and value a commitment to shared tasks as one of its intrinsic features. For instance, some describe unit cohesion as the “bonding together of an organization or unit’s members in such a way as to sustain their will and commitment to each other, the group, and the mission.”³⁷

Even today, the broad concept of unit cohesion clearly remains a part of military doctrine and training—although, strangely, without describing it or

³⁴ Lieutenant Colonel Larry H. Ingraham & Major Frederick J. Manning, *Cohesion: Who Needs It, What Is It, and How Do We Get It To Them?*, 61 MILITARY REV. 3 (June 1981). See also WILLIAM DARRYL HENDERSON, COHESION: THE HUMAN ELEMENT IN COMBAT 6 (1985).

³⁵ Manning, *supra* note 33, at 2, 5.

³⁶ Ingraham and Manning, *supra* note 34, at 6.

³⁷ Major Geoff Van Epps, *Relooking Unit Cohesion: A Sensemaking Approach*, 88 MILITARY REV. 102 (Nov.–Dec. 2008). See also Manning, *Morale and Cohesion in Military Psychiatry*, at 12.

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defining it in much useful detail.³⁸ Though its definition and scope may be open to interpretation (depending on the context studied), at least eight general related properties of the “unit cohesion” concept are apparent. All are vulnerable to the harmful influence of relational misconduct.

First, at its essence, unit cohesion is an emergent property of groups of interacting individuals—a property that can be either “thwarted” and dissolved by external forces or internal strife, or cultivated and promoted by internal group practices.³⁹ Thus, when relational crime occurs between otherwise bonded peers in a small military unit, the bond is snapped—or at least frayed. A less connected, or less interactive, set of interpersonal relationships results.

Second, unit cohesion is often viewed as a proxy for discipline.⁴⁰ Tightly bonded units will, presumably, be more capable and willing to act in concert and under the direction of their leaders. Relational crime (as defined above) will necessarily undermine the emotional and psychological factors influencing the unified obedience to command authority in both victim and offender.

Third, unit cohesion is—in part—a function of the professionalism, training, and morale of all members in the group; thus it will suffer from combinations of low-quality recruits, inadequate training, high attrition or resignation rates, rampant crime, and a low sense of job satisfaction.⁴¹

³⁸ According to AR 600-20, *supra* note 22 (“Army Command Policy”), ¶ 1-5c., “commanders are responsible for developing cohesive units.” As a guide, FM 6-22 (“Army Leadership”), ¶ 8-23, clarifies that “breaches of trust, poor team coordination, and outright conflicts” are hallmark indications of a weakly-cohesive or non-cohesive unit.

³⁹ See, e.g., Ingraham and Manning, *supra* note 34, at 9–11.

⁴⁰ Military discipline is “manifested in individuals and units by cohesion, bonding, and a spirit of teamwork.” AR 600-20, *supra* note 22, ¶ 4-1b. More directly, “[d]iscipline is based on pride in the profession of arms, on meticulous attention to details, and on mutual respect and confidence.” (General George Patton, letter of instructions to subordinate commanders, 5 June 1943) (quoted in OWEN CONNELLY, *ON WAR AND LEADERSHIP: THE WORDS OF COMBAT COMMANDERS FROM FREDERICK THE GREAT TO NORMAN SCHWARZKOPF* 124 (2002)) (emphasis added).

⁴¹ Ingraham & Manning, *supra* note 34, at 4. See also JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 198 (1994) (arguing that individual rotations, in contrast to unit-wide rotations, into and out of Vietnam directly contributed to the “destruction of unit cohesion” and led to chronic inability to prevent Post-Traumatic Stress Disorder and other psychological harms).

Fourth, unit cohesion has been viewed as a measure of workplace climate.⁴² Relational crime destabilizes service-members' sense of security among their peers and co-workers. Moreover, the unit's response to that crime may trigger a victim's negative perceptions of the commander's support, or may trigger a purported offender's negative perceptions of the commander's duty to equitably treat his or her subordinates.

Fifth, not surprisingly, unit cohesion has been viewed as an ingredient for improving individual motivation under stress.⁴³ Thus, relational crime may remove a necessary component for inspiring service-members to put mission and comrades above personal safety.⁴⁴

Sixth, unit cohesion has been found to be intimately related to a service-member's ability to "communalize combat trauma"—the opportunity for cathartic sharing of grief with others experiencing similar pain or fear.⁴⁵ Relational crime, therefore, erases linkages essential for effective coping with the inherent stress and danger experienced by service-members in both garrison training environments and combat deployments.

Seventh, unit cohesion has been seen as a measurement for a unit's social affiliations, affection, organization, and support structure.⁴⁶ Thus, relational crime—and ineffectively treated relational crime—signals a dysfunctional family incapable of preventing or resourcefully resolving internal strife.

Finally, unit cohesion, despite its connotation of group dynamics, has a poignant personal effect: it is a "primary determinant of an individual soldier's day-to-day behavior."⁴⁷ This observation supports the argument that the stronger the bonds of mutual affection and desire to accomplish shared missions in the face of shared sacrifice, the less likely that the ties between individual members of the cohesive group will internally fracture from relational misconduct.

These eight properties of unit cohesion—however it may be defined—clearly establish it within the traditional meaning of a crime's "community"

⁴² Manning, *supra* note 33, at 14.

⁴³ HENDERSON, *supra* note 34, at 22.

⁴⁴ See, e.g., The Soldier's Creed ("I am a warrior and a member of a team. I serve the people of the United States, and live the Army Values. I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade . . ."), available at <http://www.army.mil/values/soldiers.html>.

⁴⁵ SHAY, *supra* note 41, at 55.

⁴⁶ HENDERSON, *supra* note 34, at 13–14, 20. See also Manning, *supra* note 33, at 13 ("In a high cohesion unit, the commanding officer will hear about problems, gripes, snafu's from those involved, not outsiders.").

⁴⁷ HENDERSON, *supra* note 34, at 14–20.

effect. As victim-offender mediation has been regularly relied upon to resolve crimes that implicate this concern, it should follow that repairing unit cohesion may be a valid reason commanders use to justify their choice to use a form of victim-offender mediation as an unconventional technique for achieving justice within the ranks. But because the military is an organization of volunteer employees, the methods by which other large organizations rely on internal dispute resolution processes are worth considering too. Therefore, the next section examines how mediation has been employed in both criminal and administrative employment contexts to achieve the same positive results and avoid destabilizing community effects.

C. “Victim-Offender” and “Administrative” Mediation Systems for Avoiding and Repairing Harmful Community Effects

For several decades, mediation has seen increasing use in small claims disputes in civil courts,⁴⁸ “neighborhood disputes,” and in certain civilian criminal cases before prosecutors make charging or indictment decisions.⁴⁹ Civil courts turn to mediation to resolve small claims between parties because of its ability to promote bargaining (or at least an open dialogue) between disputants that may already have a pre-existing relationship—which may be healthier for sustaining long-term relationships (including commercial relationships) than its adversarial courtroom cousin, the civil lawsuit.⁵⁰ But mediation also pops up outside of courtrooms. What this article will refer to as “administrative mediation” is the use of mediation practices or systems to resolve employment-related grievances (say, between an employee and management) or conflict (say, between two disputing peer employees). Administrative mediation is best illustrated by the myriad institutionalized programs, operated by businesses and government agencies, for resolving internal grievances and conflicts using cost-effective, non-litigious, and work climate-enhancing tactics.⁵¹ Such tactics, notably, are

⁴⁸ See Susan E. Raitt, et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. ON DISP. RESOL. 55, 61–62 (1993).

⁴⁹ See, e.g., Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: a Procedural Critique*, 43 EMORY L.J. 1247, 1264 (1994).

⁵⁰ Raitt, *supra* note 48, at 61–62.

⁵¹ See generally Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135 (1999). See also ALTERNATIVE DISPUTE RESOLUTION: A RESOURCE GUIDE, <http://opm.gov/er/adrguide/> (briefly describing various mediation processes employed by government organizations, including the U.S. Postal Service, the Federal Aviation

already available within the Department of Defense and the individual Armed Services, such as the Navy.⁵²

Meanwhile, many state civilian criminal procedure systems offer bilateral approaches to justice. These approaches are premised on a belief that giving the community, the victim, and offender decision-making roles better captures and reflects the interests of the conflicting parties—even if one of the parties is ostensibly a victim of a crime.⁵³ These systems offer mediation as an alternative or diversion from prosecution because (in cases of property crimes, relational-based misconduct, or minor assaults) mediation gives the victim a far greater ability to hold the offender accountable to the victim, achieve direct emotional or financial restitution, and quickly resolve the dispute with minimal governmental interference and burden.⁵⁴ Similarly, criminal justice officials establish and manage victim-offender mediation when the goals of accountability (of the offender to the victim), catharsis (of the victim) and restitution (as defined by the victim) outweigh the government's ability to gain, or need to seek, societal retribution or to create

Administration, the Department of the Treasury, and the Department of Veterans Affairs, among others, to resolve employee conflicts; and to address issues for which internal disciplinary penalties might normally be used within, among others, NASA, the Department of Defense, and the General Accounting Office).

⁵² See, e.g., The Department of the Navy's "Conflict Management and Mediation Model," designed to be compliant with the Secretary of the Navy's Alternative Dispute Resolution policy (SECNAV Instruction 5800.13A) (Dec. 22, 2005), <http://adr.navy.mil/docs/SIGNED580013A.pdf>; see also <https://donogc.navy.mil/adr/adrcm3/One%20%/20Page%20Summary/pdf> (on file with the author). Moreover, the Defense Equal Opportunity Management Institute (DEOMI), trainers of Equal Opportunity (EO) subject matter experts assigned to line units throughout the Army, offers training on various forms of dispute resolution (including mediation). However, this training is targeted to non-commissioned officers assigned to perform the function of the command's Equal Opportunity Advisor—to employ the techniques in the execution of their official duties at resolving complaints or perception of sexual harassment, or discrimination based on gender, color, race, national origin, or religion. Additionally, DEOMI offers a 32 hour-long "mediation certification program" for graduates of its EOA and EEO courses in order "mediate *civilian* personnel and equal opportunity disputes within DoD." At best, their use of mediation skills may bleed over to other leaders through observation and I am not aware of any systemic effort to train leaders on the generic principles or techniques of mediation as a dispute resolution process, nor has it been advertised to leaders as an alternative to unconventional problem-solving when the issue is low-level criminal misconduct.

⁵³ Hallevy, *supra* note 24, at 80 ("[V]ictim-offender mediation is for the benefit of the community as much as it is for the benefit of the victim and the offender.").

⁵⁴ Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison*, 61 FED. PROBATION 33, 33 (1997).

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a deterrent.⁵⁵ Victim-offender mediation is considered an alternative to traditional prosecutions wherein the goals of accountability to the victim, restitution, and emotional catharsis of the victim are emphasized in order to strengthen or repair relationships and to ease both tangible and intangible harms.⁵⁶ Victim-offender mediation is described by its proponents as a “face-to-face meeting, in the presence of a trained mediator, between the victim of a crime and the person who committed that crime . . . [wherein] the offender and the victim can talk to each other about what happened, the effects of the crime on their lives, and their feelings about it . . . [which may result in] a mutually agreeable plan to repair any damages that occurred as a result of the crime.”⁵⁷ This process is said to give both parties an opportunity to “make the situation as right as possible,” while operating “within or alongside the criminal justice system.”⁵⁸

This form of criminal problem solving falls within the broader concept of “restorative justice” in which neither the parties nor the crime can be detangled from the web of social interactions or community in which they play out. By deliberately accounting for the desires of the parties and the social context, victim-offender mediation arguably plays a “therapeutic” role in the criminal adjudicatory process.⁵⁹

Generally, unlike mediation, adversarial systems showcase parties presenting opposing views of reality, arbitrated and decided by a fact-finder like a judge or jury based entirely on legal definitions, concepts, and rules. In stark contrast to adversarial processes like litigation, unilateral employment grievance resolutions, or criminal trial by court-martial, victim-offender mediation and administrative mediation are approaches to solving interpersonal conflict in which a facilitator helps the disputing parties better understand the source of conflict between them, to identify matters of

⁵⁵ Hallevy, *supra* note 24, at 73–81.

⁵⁶ See Reimund, *supra* note 13, at 671, 673–74 (2005).

⁵⁷ VICTIM OFFENDER MEDIATION ASSOCIATION, <http://www.voma.org/abt vom.shtml>. See also Bakker, *supra* note 7, at 1484.

⁵⁸ Bakker, *supra* note 7, at 1480.

⁵⁹ Hallevy, *supra* note 24, at 78. See also Katherine L. Joseph, *Victim-Offender Mediation: What Social & Political Factors will Affect its Development*, 11 OHIO ST. J. DISP. RES. 207 (1996). David Wexler defines “Therapeutic jurisprudence” as “the study of the role of the law as therapeutic agent . . . [this] ‘lens’ enables us to ask a series of questions regarding legal arrangements and therapeutic outcomes that likely would have gone unaddressed under other approaches . . . [and may] aid in criminal law and procedure.” David Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280–81 (1993).

concern, and work toward a mutually-acceptable resolution.⁶⁰ That resolution may look nothing like traditional punishment but might, in effect, satisfy the needs of the victim and repair a repairable relationship. Cooperation, bargaining, and discussion based entirely on the disputants' definition of the conflict frame the mediation; progress is measured against metrics and rules that may be far afield from formal legal norms and rules.⁶¹

A strong sense of collaborative process-shaping underlies these overt features. Though the road toward a mediation session may be kick-started by courts or a prosecutor screening case files for those fact-patterns deemed suited to the process, gates through which the parties then pass are opened and closed with the participation and approval of the autonomous parties themselves.⁶² The victim of the offense, or aggrieved employee, is offered a choice—the consequences of which shape subsequent choices by the prosecutor or employer and subsequent opportunities of the offender. During the mediation, each party must make informed choices about what information to disclose and what information to keep hidden, about how to interact with the other party, and about which areas within the context of the dispute are negotiable and which areas are not.

Second, notwithstanding the role of collaboration in both the procedure and substance of mediation, there is a strong taste of "self-determination" implicit within such systems.⁶³ A crime victim evolves from a passive witness called by the state into an "active partner in the process."⁶⁴ If, for instance, the victim were to reject the initial offer made by the prosecutor (perhaps because she feared the perpetrator, or her sense of retaliation and retribution demanded that the conflict be resolved in a public, adversarial courtroom) the system would retreat back toward a traditional, unilateral, approach and the victim's interests would become absorbed by the state, permitting the state to prosecute the offender for violation of its laws. Similarly, if neither the victim nor the offender were satisfied with the mediation itself (that is, they could not understand each other's relative interests and work toward a mutually-acceptable solution) then they, knowingly and voluntarily, shrink the range of options left open to resolve the conflict. Both of these examples relate only to procedural triggers that start or end the ADR process. But the parties' self-determination is even

⁶⁰ See Mark S. Umbreit, *supra* note 10.

⁶¹ Hallevy, *supra* note 24, at 74.

⁶² *Id.* at 82.

⁶³ Hallevy, *supra* note 24, at 82–84.

⁶⁴ *Id.* at 76.

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more sharply illustrated during the mediation itself, where the parties actively decide the scope and content of the conversation, and determine—with varying degrees of influence by the mediator (or none at all)—the scope and content of the resolution. The parties, as much as the state, have a say in shaping the long-term consequences of the dispute or crime.⁶⁵

But these common features, in what one writer calls a “drama with a large cast of players,”⁶⁶ also imply a host of procedural issues. The resolution of these issues further impacts the rights of the parties relative to each other, as well as the nature, structure, and enforceability of their mutual agreement. Deciding, for example, *when* to mediate, selecting *who mediates*, identifying the person *who offers* the mediation or *when* to offer it, *who mandates* the mediation, *where* to mediate, the *form* of the mediated agreement, the *goal* of the mediation session, the *role* of the disputants’ lawyers, and the particular *approach* or style of the mediator inside the room are just some of the choices that may affect the outcome in any given case, most notably on the attributes of fairness, enforceability and durability of the resolution.⁶⁷ Consequently, the practice of mediation is so varied that even discerning a common pattern of effective mediation styles is subject to intense academic and professional disagreement.⁶⁸

⁶⁵ See, e.g., FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS, Rules 10.210 (“Mediation Defined”) and 10.310 (“Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.”).

⁶⁶ Hallevy, *supra* note 24, at 78.

⁶⁷ Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 10–11 (1996). The role of the mediator inside a session (with respect to the type and amount of information he or she provides to the parties, the balance he or she strikes between facilitating conversation and generating ideas for the parties, and whether he or she engages in any subjective evaluation of their respective positions and interests) is a hotly debated topic in practice and academic circles. See also Appendices A, B, and C following the body of this article, in which I attempt to show one application or series of answers to these questions. See Sander & Rozdeiczer, *supra* note 25, at 39–40.

⁶⁸ See generally Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Suskind*, 6 VT. L. REV. 85 (1981); Marjorie Corman Aaron, *ADR Toolbox: The Highwire Act of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIGATION 62 (1996). See also Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 72 n.4 (cataloguing more than a dozen pieces of scholarship debating, to some extent, the fundamental philosophies that do—or should—guide neutral interveners participating in mediation).

Defined in this way, and despite the varied practice or style of mediation, five key features distinguish mediation from traditional state-sanctioned adversarial conflict resolution:

- A mediator with no interest in the outcome of the dispute, no formal relationship with the disputing parties, and no authorization to enforce any settlement agreement;
- Voluntary agreement among the disputing parties to participate in mediation;
- No expected or coerced settlement among the disputing parties;
- No pre-determined consequence for failing to arrive at a settlement.
- Exercising both self-determination and collaborative problem-framing, the parties define what a “just” outcome should or will be.⁶⁹

With these general, but key, features of mediation in mind, this article will next turn to the question of how such a conflict resolution system would fit within orthodox military justice. To answer that, we must first appreciate two essential philosophies and characteristics of military justice. First, the focus of military justice is necessarily reinforcing discipline and instilling order within the ranks to make the accomplishment of military missions and operations successful. Secondly, commanders are responsible for enforcing and promoting this type of justice because they are ultimately responsible for accomplishing the military mission—i.e., meeting one objective contributes to the other. It turns out that neither of these intrinsic philosophies rules out creative, multilateral dispute-resolution under appropriate circumstances. Indeed, they both may be interpreted as creating the conditions that would permit mediation to grow alongside traditional military justice processes.

⁶⁹ One well-regarded commentator and practitioner of mediation wrote that “there is no comprehensive or widely-accepted system for . . . describing [forms of mediation].” Riskin, *supra* note 67, at 8. Though we can glean certain key terrain features associated with most forms of mediation, Riskin essentially argues that the variety of techniques employed by mediators and the variety choices that courts, disputants, lawyers, and mediators face in designing a system (or case-specific procedure) make a universal description of mediation impossible, or at least potentially “misleading.” *Id.* at 11.

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III. NESTING MEDIATION WITHIN ORTHODOX MILITARY JUSTICE

A. *Traditional Military Justice*

1. *Orthodox Military Criminal Law is Focused on Discipline and Order*

Nine months into a year-long deployment, Sergeant Bixbee,⁷⁰ a team leader in the Brigade Headquarters' logistics planning section, hears from a buddy that he has been recommended (along with most sergeants) for an Army Commendation Medal as his "end-of-tour" award. Though not surprised, this sergeant becomes suddenly apoplectic when he overhears that his long-time roommate and fellow team-leader in the logistics section, Sergeant Conners, was being recommended for a Bronze Star medal, a more renowned and distinguished award. Though they considered themselves friends, their relationship has slowly but noticeably soured ever since Bixbee learned that his girlfriend cheated on him with Conners shortly before they deployed together, though after Bixbee had ostensibly broken off his relationship with his girlfriend. Furious at the news of the disparate award decision, Bixbee unleashes his frustration in front of the personnel services section, screaming a series of profanity-laced insults against Conners, including allegations that Conners did not deserve that medal because he routinely "abused" the company's policy on driving non-tactical vehicles for personal use around their forward operating base. Sergeant Bixbee then storms away, putting his fist angrily through dry-wall as he departed and completely ignoring the verbal command of his company First Sergeant, who had arrived halfway through the tirade, to "stay right here and don't say another word."

Using the traditional approaches of military justice, a commander could address and resolve the dispute described above in a variety of ways. At least eight distinct offenses are raised by this fact pattern⁷¹—each of which

⁷⁰ All names within this article's hypothetical fact patterns are fictional.

⁷¹ Sergeant Bixbee's loud, unruly screaming and punching the wall in front of another Soldier in the unit's office space could constitute a violation of Art. 108 (wrongful damage to government property), Art. 116 (as a breach of the peace), Art. 128 (assault, by offer), and Art. 134 (disorderly conduct; or self-injury without intent to avoid service). UCMJ, 10 U.S.C. §§ 908–934 (2012). Knowledge, but non-disclosure, that his fellow non-commissioned officer was breaking a unit policy or general order regarding personal use of non-tactical vehicles in a hostile fire zone implicates Art. 77 and Art. 121 (wrongful appropriation of government property under an aiding and abetting theory) or

(isolated or together) shoulder differing degrees of stigma, trigger a range of professional consequences, impose myriad costs and burdens on the command, and inflict an array of potential punishments or otherwise adverse administrative penalties. Obviously, orthodox tools like formal and informal counseling, non-judicial punishment under Article 15 of the UCMJ,⁷² reprimands, and transfers are all available options for a commander to consider in resolving this conflict between two brigade staff members.⁷³ Given their ranks, however, and given that the staff is deployed to a combat zone, choosing among these various options is a complicated endeavor.

For example, the gravity of the offense must surely be weighed against the effect such traditional approaches might have on *esprit de corps* and unit cohesion—axiomatically important factors for a deployed unit. Moreover, the forecasted effect of the traditional approaches must be balanced against their inherent uncertainty in resolving the underlying friction: the less certain the commander is about the nature of the relational misconduct's cause, the less certain the commander should be about the consequences of the chosen punishment. Finally, the commander's inclination to pursue some degree of an investigation into Sergeant Bixbee's anger-fueled allegations, or proceed with a traditional punitive action against him must be tempered by the logistical, operational, and emotional features of a unit deployed to a theater of war. These considerations are the *raison d'être* for military law and its separate penal code:

The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.⁷⁴

Even the Supreme Court has “long recognized” that a unique balance between justice and military effectiveness necessarily drives the evolution of

possibly Art. 134 (misprison of serious offense). *Id.* at §§ 877–934. Ignoring the First Sergeant's order to remain in place after hitting the wall raises the specter of Art. 91 (insubordinate conduct toward a non-commissioned officer). *Id.* at § 891.

⁷² “[A]ny commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial” [thereafter listing special constraints and circumstances]. UCMJ, art. 15 (2012), 10 U.S.C. § 815(b) (2012). *See also* MCM, Part V.

⁷³ *See* R.C.M. 306(c) and MCM, Part V.

⁷⁴ MCM, Preamble, ¶ 3.

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customary military tradition and criminal sanctions.⁷⁵ The UCMJ is replete with prohibitions on “aspects of the conduct of members of the military which [in] the civilian sphere are left unregulated” because, in part, they directly implicate the general discipline of, or tend to repudiate the public estimation of, the “tightly knit military community.”⁷⁶

Nevertheless, even with such a fundamentally distinguishable purpose framing the military justice system’s structure and substance, no criminal justice system functions in a vacuum. Human judgment and discretion naturally animate these prosecutorial decisions based on a desire for deterrence, retribution, incapacitation, restitution, rehabilitation, or a blend of these goals. However, this truism remains intact even when the commander’s ultimate end is not one of these traditional criminal justice goals, but rather the restoration or strengthening of unit cohesion through some form of victim-offender mediation.

2. Military Justice is Command-Directed, Thus Permitting Potential Bridges to Non-Traditional Approaches

Any traditional military justice approach the commander might employ would be imposed unilaterally and from the top down: that is, the commander—rather than the disputing parties as in a mediation—makes a decision and takes action based on an informed, but ultimately divorced, impression of what he or she believes to be fair and appropriate. In many cases, commanders (rather than law enforcement agencies) decide whether a criminal or quasi-criminal investigation should ensue and what form it should take.⁷⁷ Commanders decide, when the evidence is available, how to proceed—to prosecute or not; and if yes, to what level?⁷⁸ With non-judicial punishment, commanders ultimately decide the scale of (limited) punishment

⁷⁵ *Parker v. Levy*, 417 U.S. 733, 743 (1974).

⁷⁶ *Id.* at 749. See MCM, Part IV, ¶ 60.c.(2) and (3). See also UCMJ, arts. 83–97, 89, 90, 91, 92, 94, 99, 100, 101, 102, 103, 104, 105, 106, 112, 113, 115, 133, and 134, 10 U.S.C. §§ 883–934. Some prototypically civilian offenses criminalized by the UCMJ, such as Art. 128, are further aggravated with supplemental elements enhancing the maximum available punishment under conditions that erode or degrade traditional concepts of military discipline and order.

⁷⁷ See, e.g., U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6]; R.C.M. pt. 303.

⁷⁸ R.C.M. pt. 306.

upon a finding of guilt.⁷⁹ A senior commander empowered to convene a court-martial ultimately has the authority to approve or reduce the findings or sentence meted out by the judge or panel.⁸⁰

Striking as this may appear to the civilian criminal bar, this responsibility is the lawful and traditional judicial authority vested in commanders. Military officers, as the eminent Samuel Huntington once paraphrased, are professional managers of violence.⁸¹ But when also challenged with the responsibility of command, they face an inventory of daunting managerial tasks, all of which are directly or indirectly associated with unit cohesion.⁸² While their “primary function [is] accomplishing the unit’s assigned mission [they must necessarily do so] while caring for personnel and property in their charge”⁸³; in a general sense: they are “responsible for everything their command does or fails to do.”⁸⁴ Commanders must encourage and sustain the professional development of the Soldiers under their command;⁸⁵ leverage the “full range of human potential” in their organization;⁸⁶ instruct their charges on military discipline and military law;⁸⁷ ensure their soldiers are properly trained, and that their equipment and government property is in a “proper state of readiness at all times.”⁸⁸ Existentially, commanders must also demonstrate “virtue, honor, patriotism, and subordination,”⁸⁹ to examine the conduct of subordinates and “guard against and suppress all dissolute and immoral practices;”⁹⁰ to “take all necessary and proper measures, under the laws, regulations, and customs of the Army” in “promot[ing] and

⁷⁹ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE, ¶¶ 3-1-3-45 (3 Oct. 2011) [hereinafter AR 27-10]; MCM, Part V.

⁸⁰ UCMJ Art. 60(c)(1) and (3)(A)–(B), 10 U.S.C. § 860; R.C.M. pt. 1107(b).

⁸¹ SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 11 (1957).

⁸² Commanders are entrusted with “establishing [the] leadership climate . . . and developing disciplined and cohesive units.” U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, ¶ 1-5c (18 Mar. 2008). Though this regulation is Army-specific, its tenets related to command responsibility may reasonably be considered universally applicable across all armed services.

⁸³ *Id.* at ¶ 2-1a.

⁸⁴ *Id.* at ¶ 2-1b.

⁸⁵ *Id.*

⁸⁶ *Id.* at ¶ 1-5c(4)(a).

⁸⁷ *Id.* at ¶ 1-5c(4)(b), and ¶ 4-1c.

⁸⁸ AR 600-20, ¶ 1-5c(4)(c).

⁸⁹ *Id.* at ¶ 1-5d(1).

⁹⁰ *Id.* at ¶ 1-5d(2) and (3).

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safeguard[ing] the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.”⁹¹

This catalog of regulatory, customary, and traditional⁹² duties comes with it a special and—when compared to leaders in the business or civil government—unique obligation to exercise the means, methods, and goals of justice within the ranks. By giving commanders the ability to launch investigations into misconduct, pursue administrative corrective measures, initiate non-judicial punishment, charge service-members with crimes under the UCMJ, or take no action whatsoever, the military has afforded its executives—junior, mid-level, and senior managers—powers akin to police chiefs, district attorneys, and judges.⁹³ But the difficulty then becomes one of commanders properly and justly exercising such wide-ranging, and judgment-rife judicial powers—a duty that the drafters of the Manual for Courts-Martial acknowledge to be “one of the most important and difficult decisions facing a commander.”⁹⁴

The Manual for Courts-Martial is the primary exposition, in military law, of a commander’s prosecutorial discretion. It lists factors that a judicious, fair commander should consider before taking any action in response to a given crime or misconduct.⁹⁵ The ability to navigate these factors and exercise the independent maturity required of these judicial functions is steered only by the commander’s natural prudence, experience, and advice from trusted subordinates, peers, or senior officers. Each of the Armed Services publishes veritable libraries of detailed regulations, field manuals, technical manuals, forms, pamphlets, circulars, and training guides to provide commanders with clear standards and rules for accomplishing various tasks. In individual cases, the commander must consider these subjective factors with no clear guidance on how to value or weight these factors in making that ultimate disposition choice.⁹⁶

⁹¹ *Id.* at ¶ 1-5d(4) and (5).

⁹² HUNTINGTON, *SOLDIER AND THE STATE*, *supra* note 82 at 15.

⁹³ See generally Major Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1 (1968), available at <https://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsaweb.nsf/Main?OpenFrameset>.

⁹⁴ R.C.M. 306(b), Discussion.

⁹⁵ *Id.*

⁹⁶ *Id.* These factors include: the nature of the misconduct, availability of witnesses and other evidence, the impact on the purported victim, the effect of the ill-discipline on the unit’s mission or readiness, military “exigencies,” recommendations by the chain-of-command, motives of the accuser, the appropriateness of the anticipated or likely

B. Current Institutionalized Processes Allow for Innovation

1. *Manual for Courts-Martial*

Beyond the UCMJ penal statute and the judicial decisions from the disparate service trial and appellate courts and the federal Court of Appeals for the Armed Forces,⁹⁷ military criminal law is a broad domain. It encompasses service-specific regulations that implement the UCMJ; the orders of the president as Commander-in-Chief of the Armed Forces; and the natural, inherent authority of commanders to enforce good order and discipline.⁹⁸ *The Manual for Courts-Martial (MCM)* is a compendium of these sources of law and includes the Rules for Courts-Martial (RCM) and the Military Rules of Evidence (MRE) promulgated under the president's procedure and rule-making authority under Article 36 of the UCMJ.⁹⁹ The *MCM*'s most overt purpose is to provide a single-source body of law and procedures for practitioners and the public to consult.¹⁰⁰ The *MCM* is particularly noteworthy for the broad discretion it affords commanders and the flexible approaches to managing misconduct it endorses.

First, the RCM contains sweeping prescriptive procedural rules and presidential guidance for applying and interpreting those rules when adjudicating criminal offenses.¹⁰¹ Of course, the catalyst for any criminal adjudication is ultimately the commander's choice to pursue one of several courses of action given that situation's factual circumstances. This discretion

punishment, the professional history of the suspect, and the effect of the potential punishment on the soldier's career. See also MCM, Part V.1.d. (1)–(2).

⁹⁷ The Army, Coast Guard, and Air Force each have a discrete criminal appellate court (the Navy and Marine Corps share an appellate court) empowered to review the decisions, findings, and sentences from the trial courts-martial. 10 U.S.C. §866 Art. 66. The Court of Appeals for the Armed Forces is empowered to review decisions from the respective service Courts of Criminal Appeals, which is then subject to review by the U.S. Supreme Court. 10 U.S.C. §867 Art. 67 and §867a Art. 67a.

⁹⁸ U.S. CONST. art. III, §2, cl. 1; MCM, Preamble, at I-1; WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 27–28 (2d. ed. reprint 1920).

⁹⁹ 10 U.S.C. §836 Art. 36.

¹⁰⁰ MCM, Appendix 21, at A21-1.

¹⁰¹ *Inter alia*, the R.C.M. includes rules on jurisdictional matters (R.C.M. 201–204), apprehension and pre-trial restraint (R.C.M. 302, 304, 305), pre-trial investigations (R.C.M. 405), actions by the court-martial convening authority (R.C.M. 403, 404, 407, and 601), composition of military juries and the qualifications for judges and counsel (R.C.M. 501, 502), discovery and witness production (R.C.M. 701-703), specific trial procedures (R.C.M. 810–813, 901–924, 1001–1011, and 1101–1114), and the appellate process (R.C.M. 1201–1210).

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is best embodied in RCM 306, entitled “Initial Disposition,” modeled in part on the American Bar Association’s standard for prosecutorial discretion.¹⁰² In the RCM 306’s non-binding but persuasive “discussion” section, in which the drafters distill treatise-like guidance to the field,¹⁰³ commanders and their legal advisors are alerted to the myriad considerations that ought to bear on the disposition choice. Rather than look to the nature of the offense alone, or the strength of the evidence, or the desire for retribution against the offender, the Rule permits a broader view that stretches across the full context of the incident. To achieve the end-state of a “warranted, appropriate, and fair” prosecutorial decision, the Rule tasks commanders to carefully balance salient features that shape the encapsulating military community: military exigencies like short-notice deployments or training, the suspected offender’s character and military service, as well as “the extent of the harm . . . including the offense’s effect on [the] morale, health, safety, welfare, and discipline” of the military organization or unit to which the suspect is assigned.¹⁰⁴

Once these factors are weighed, the commander is still left with various options for addressing the misconduct or offense in a way that is “warranted, appropriate, and fair”¹⁰⁵—take no action at all,¹⁰⁶ charge and pursue a court-martial,¹⁰⁷ or pursue non-judicial punishment under Article 15 of the UCMJ¹⁰⁸ (an abbreviated process in which the suspect trades away some due process rights for a cap on potential punishments and expediency, but which can be rejected by a suspect in favor of a court-martial on the merits.)¹⁰⁹ This flexibility is further amplified by giving the commander free reign to design an administrative solution that best fits within the case-specific circumstances and salient features of the military community in which the offense occurs.¹¹⁰ The list of such administrative (“corrective”) solutions is long and non-exhaustive:

¹⁰² ABA STANDARDS, PROSECUTORIAL FUNCTION 3-3.9(b) (1979) (ABA 3d ed. 1993). See MCM, Appendix 21, at A21-21.

¹⁰³ MCM, Appendix 21, at A21-3.

¹⁰⁴ R.C.M. 306(b), Discussion.

¹⁰⁵ R.C.M. 306(b)(1), Discussion.

¹⁰⁶ R.C.M. 306(c)(1).

¹⁰⁷ R.C.M. 306(c)(4), 401.

¹⁰⁸ R.C.M. 306(c)(3).

¹⁰⁹ See generally MCM, Part V.

¹¹⁰ R.C.M. 306(c)(2).

[C]ounseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.¹¹¹

Though these possible choices are less severe than criminal sanctions, they still reflect the prosecutor-like discretion of the commander, and imply such discretion is open to creative problem-solving. Less-formal, less-directive, multi-lateral options are not foreclosed. Part V of the *MCM* expounds on this flexible discretion to design corrective solutions, describing them as part and parcel of “effective leadership” used to maintain good order and discipline.¹¹² Moreover, while these corrective solutions are considered more of a *consequence* than punishment, the drafters specifically envisioned that commanders might—relying on the principles of RCM 306—adopt creative solutions for redressing misconduct:

Administrative corrective measures are not punishment, and they may be used for acts or omissions which are not offenses under the [UCMJ] *and for acts or omissions which are offenses* under the [UCMJ] (emphasis added).¹¹³

These provisions endorse commander discretion and the kind of creative, case-by-case adjudication that contemplates the military community and environment in which the offense arose. In the absence of any direct or tacit caveat, or outright disapproval, for mediation, these provisions lend clear support for unorthodox approaches, mediation included, that circumvent traditional disciplinary actions like courts-martial or non-judicial punishment when the facts call for them. Since military criminal law appears to offer no prohibition or barrier, and indeed suggests it may be tolerant of victim-offender mediation under RCM 306’s principles, the next question is whether commanders might find further support in operational decision-making doctrine. As discussed *infra*, such support may be found in (or at least adapted from) two complementary sources.

¹¹¹ *Id.*

¹¹² *MCM*, Part V.1.d(1).

¹¹³ *Id.* at Part V.1.g (emphasis added).

2. *Design and Composite Risk Management: Dealing with Uncertainty, Risk, and Complexity*

The Army has doctrinally adopted several reasoning methodologies for coping with uncertainty and multi-dimensional tactical problems in a way analogous to the *MCM*'s permissive support for non-judicial punishment and flexible administrative corrective measures.¹¹⁴ As with many complicated problems with uncertain outcomes fraught with risk for potential unintended consequences, military officers rely on historically-proven and well-rehearsed methodologies that simplify these problems. One such heuristic familiar to commanders is the Military Decision-Making Process (MDMP).¹¹⁵ By breaking problems down to manageable tasks, clearly defining objectives, establishing and relying on quantifiable metrics for grading various possible courses-of-action, leaders are funneled toward a rational, reasonable decision in face of hazy or chaotic operating environments. *Design*, in contrast to the traditional MDMP mentioned earlier,¹¹⁶ explicitly recognizes the friction, unpredictability, and human limitations intrinsic to conflict.¹¹⁷ Consequently, proponents of this methodology actively encourage the "critical and creative" visualization,

¹¹⁴ This article focuses on the Army, rather than inclusive of the other Armed Services, for two reasons. First, the author's professional experience in the Army affords a far clearer perspective for assessing opportunities for mediation. Second, the Army is the largest consumer and producer of military justice: population-wise, it is the largest of the Services and annually prosecutes more courts-martial for misconduct than the other Services. In the Fiscal Year 2011, the Army reported that it tried 1,081 cases to conviction or acquittal (combining both "General" and "Special" courts-martial statistics), whereas the Air Force accounted for 664 trials, the Coast Guard accounted for 38, and the Navy and Marine Corps combined for 898 courts-martial. *Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and the Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2010 to September 30, 2011*, app. at §§ 3, 4, 5, and 6 (reports of the individual Service Judge Advocate Corps and service-specific "Military Justice Statistics").

¹¹⁵ Major Blair S. Williams, *Heuristics and Biases in Military Decision Making*, MIL. REV. 40, 40–52 (Sept.–Oct. 2010).

¹¹⁶ Brigadier General (P) Edward C. Cardon & Lieutenant Colonel Steve Leonard, *Unleashing Design: Planning and the Art of Battle Command*, MIL. REV. 2, 3 (Mar.–Apr. 2010) [hereinafter, *Unleashing Design*].

¹¹⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS, ¶ 3-20 and ¶ 3-24 (26 Mar. 2010).

description, and formulation of novel approaches to complex, “ill-structured” problems.¹¹⁸ This largely formless approach, distinguished from a systemic analytical process, relies on “multiple perspectives” and “varied sources of situational knowledge”¹¹⁹ to generate a model of problem framing.¹²⁰ If the problem is framed accurately—that is, the “symptoms, the underlying tensions, and the root causes” of the conflict or issue are understood and valued properly—then commanders and their staffs are in the best possible position to distinguish the truly critical components of their mission from the ancillary or incidental features. To paraphrase its advocates, this nascent Army doctrine allows commanders to not just solve the problem right, but to solve the right problem.¹²¹

Though largely unstructured, *Design* demands a free-flowing, “iterative collaboration and dialog” among echelons of command, subject matter experts, and hand-picked staff to complement the delivery of command guidance and the orders process.¹²² It is presented as cyclic and continuous—an organizational learning exercise in which the motives, tendencies, limitations, and context of possible environmental circumstances, unintended consequences, and actors are examined, re-examined, and “synthesized.”¹²³ *Design* is, for lack of a better phrase, *designed* to foster the brain-storming development of a reasonable set of desired conditions, and identify creative and potentially unconventional solutions that engineer those conditions.

Similarly, *Composite Risk Management (CRM)* is self-styled as the “Army’s primary decision-making process to identifying hazards and controlling risks across the full spectrum of Army missions, functions, operations, and activities.”¹²⁴ *CRM* intends to be a chaos-mitigation tool fully integrated within the broader process of generic MDMP.¹²⁵ The Army defines “hazard” rather expansively, as those acts or threats that not only damage people or equipment, but as anything that otherwise has an impact

¹¹⁸ U.S. DEP’T OF ARMY, *supra* note 117, at ¶ 3-1.

¹¹⁹ *Id.* at ¶ 3-3.

¹²⁰ *Id.* at ¶ 3-8.

¹²¹ *Unleashing Design*, *supra* note 116 at 6; FM 5-0, ¶ 3-26.

¹²² FM 5-0, ¶ 3-30, 3-32.

¹²³ FM 5-0, ¶ 3-36, 3-37, 3-38, and 3-49.

¹²⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 5-19, COMPOSITE RISK MANAGEMENT, 1-1 (21 Aug. 2006) [hereinafter FM 5-19]. *See also* U.S. DEP’T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM, ¶ 1-5c (7) (23 Aug. 2007) [hereinafter AR 385-10] (mandating that all “Army leaders at all levels” will “integrate CRM into their mission activities”).

¹²⁵ FM 5-19, ¶ 4-5.

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(presumably detrimental) on “mission effectiveness” whether it is on- or off-duty.¹²⁶ Notably, such a broad definition expressly envisions *CRM*’s adoption by military justice practitioners:

The principles of CRM become indispensable in addressing issues that impact Soldiers both on *and off the battlefield*. Effective CRM is on-going and cyclic. The risk management process is integrated into the development of all SOPs and the development process for all policies that *address issues of behavior, health, and criminal activity*. (emphasis added)¹²⁷

The decision-making approach that *CRM* attempts to inculcate is a five-step, deeply proactive, model that has leaders continuously “identifying” and “assessing” hazards, and subsequently “developing” and “implementing” control measures.¹²⁸ Moreover, *CRM* envisions leaders addressing the “behavior traits of individual Soldiers” as a key component of the hazard-identification process.¹²⁹ By encouraging leaders to acutely probe all possible risks, their impacts, and comparing potential loss against potential gain,¹³⁰ leaders should develop a continuous feedback loop of information on which to base and then refine decisions affecting how a particular mission is framed and the means by which it is to be executed.

Such a standardized system has unequivocal generic resonance. In fact, Army doctrine explicitly considers *CRM* as a valuable aid in preventing one particular type of relationship-based crime: sexual assaults.¹³¹ Moreover, doctrine openly acknowledges the wide potential field of applications for *CRM*’s five-step model outside traditional military training and war-fighting.¹³²

In sum, both *Design* and *CRM* address distinct but related types of duties inherent to command responsibility: risk reduction and mission-accomplishment. Because both methodologies acknowledge that such endeavors are fraught with unforeseeable or unintended consequences, their doctrines demand continuous reflection and adaptation to situational constraints and human-driven variables. They incorporate principles of

¹²⁶ *Id.* at ¶ 1-2.

¹²⁷ *Id.* at ¶ 6-1.

¹²⁸ *Id.* at ¶ 1-1, ¶ 1-27, ¶ 1-36.

¹²⁹ *Id.* at ¶ 1-9, ¶ 1-15.

¹³⁰ FM 5-19, ¶ 4-5.

¹³¹ *Id.* at ¶ 6-2.

¹³² *Id.* at ¶ 6-5, 6-6.

flexibility and creativity, and require collaborative, proactive leaders in order to fully implement their approaches. Both *Design* and *CRM* seem ripe, therefore, as useful doctrinal foundations on which to explore alternative or unorthodox military justice applications. Therefore, the next question is whether mediation can be viewed similarly: as a forum for considering situational constraints and opportunities for collaborative engagement, and the extent to which it permits flexibility, creativity, and innovative problem-framing.

C. Mediation for "Relational Misconduct": Re-framing RCM 306 for a Mediation Decision

In deciding whether to offer third-party mediation in the wake of relational misconduct (or to avert it), commanders should reflect on the properties of unit cohesion, gauging the extent to which an incident of relational crime disrupts it. Doing so necessarily implies a judgment call in the same way that orthodox discipline is decided and executed under the policy guidance of RCM 306.¹³³ But in order to balance the interests of the service-member against the default inclination toward traditional methods of ensuring discipline, the commander should consider multiple factors and circumstances in the same way he or she would under RCM 306. So, for instance, a commander may consider:

- the nature of the conduct, including its effect on "morale, health, safety, welfare, and discipline"¹³⁴
- the likelihood that the relational misconduct will continue or escalate in the absence of command intervention
- the relationship (professional and personal) between the disputing service-members: does the fracture of the relationship implicate unit cohesion concerns?
- the prevalence of this misconduct across the unit and any corresponding need for a general deterrent

¹³³ Here, one looks to a combination of sources in the MCM that discuss the expansive jurisdiction of the commander and his or her authority to trigger both an investigation of crime and the disposition of offenses once investigated. For a thoughtful critique of those powers, see Guy P. Glazier, *He Called for his Pipe, and he Called for his Bowl, and he Called for his Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

¹³⁴ See R.C.M. 306, discussion.

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- each disputing service-member's professional record and the impact that judicial or nonjudicial punishment would have on that record
- an assessment of each disputing Soldier's ability and willingness to participate in mediation in good faith¹³⁵
- whether a traditional "administrative corrective measure" is a more appropriate remedy given the considerations listed above¹³⁶
- whether unit cohesion and team-building might be improved in this case by encouraging a problem-solving approach by the disputants themselves, rather than imposing a resolution from the command
- recommendations from the Soldiers' chain-of-command and supervisors
- the unit's operational tempo and whether a referral to mediation would significantly interfere with military operations, essential training, or deployment

Note that many of these factors mirror the extenuating, mitigating, or aggravating factors described in the *MCM*,¹³⁷ but several—for example, the personal relationship between the disputing Soldiers and effect on unit cohesion—are related, instead, to the type of dispute most commonly associated with, and benefiting from, a mediated settlement. If a more detailed standard, beyond a menu of factors, should need to be articulated, the existing language of the *MCM* could be tailored to read:

Mediation may be appropriate when preferral of charges or imposition of nonjudicial punishment would not meet the needs of justice, discipline, or unit cohesion. Furthermore, mediation may be appropriate when traditional administrative corrective measures are inadequate or over-punitive given the

¹³⁵ "Good faith" is not easily defined, or is perhaps *more* easily defined by its opposite: as in, mandated or coerced participation in mediation, or "half-hearted" efforts to settle, or "gaming" the process by only disclosing information that the disputant knows would shape the outcome in a way most favorable to their position and most unfavorable to their "opponent," or participation in the process only to obtain discrediting information about the other party are all examples of potential "bad faith" participation. See Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith in Mediation*, DISP. RESOL. MAG., Winter 1997 at 9, 9–13 (1997) (identifying some impediments to precise definition of "good faith" in a mediation and proposing an inclusive list of illustrations of "good faith," as well as proposing consequences for failing to satisfy that standard).

¹³⁶ See MCM, Part V.1.g.

¹³⁷ See R.C.M. 306(b), discussion.

nature of the Soldiers' conduct, the disputing Soldiers' professional and personal relationship, an assessment of the Soldiers' willingness and ability to participate in mediation in good faith, the impact of traditional measures on the Soldiers' record, and need to promote team-building and strengthen unit cohesion.

By mirroring the language of the MCM and Article 15 guidance, this mediation-referral standard is more familiar linguistic territory for both commanders and their advising Judge Advocates. It places mediation on the same spectrum of disposition choices as “punishment” and “administrative corrective measures,” but it reinforces the commander’s discretion to decide where and when that point is most appropriately located.

IV. A PROSPECTIVE FRAMEWORK AND PLAUSIBLE CONCERNS

Operational doctrine and military jurisprudence both seem to suggest opportunities for exploring unorthodox problem-solving, like mediation, in the context of a relational misconduct. At the very least, mediation is not directly prohibited by the UCMJ, the Manual for Courts-Martial, or regulations. However, indirect prohibitions—or at least indirect but off-putting consequences of mediation—might suggest such a system is pragmatically or legally suspect. First, in Part IV.A., this section proposes a model or framework mediation system against which we can weigh potential criticisms; secondly, in Part IV.B., this article identifies those chief concerns with mediation, most of which have been robustly discussed in civilian academic analyses. But, given the nature of the military and its traditional criminal justice procedures, additional anxieties—primarily related to efficiency and encroachment on command-discretion—are also raised. Thoughtful consideration of these concerns, after reviewing a possible mediation framework, though, suggests these concerns may be unwarranted or overreactions to a system that has, up to this point, been absent (and therefore unexamined) from the practical reality of military justice.

A. Prospective Framework: A “Commander’s Alternative Mediation Program”

Captain (CPT) Mike Jackson is the Deputy Officer-in-Charge (OIC) of an eight-Soldier staff section in a Brigade Headquarters. Master Sergeant (MSG) Marissa Williams is the section Noncommissioned Officer-in-Charge (NCOIC). The Brigade headquarters has been deployed to Iraq for five weeks, but these two Soldiers have worked together for nearly a full year.

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Over the last four or five months, but especially over the course of deployment so far, tensions have periodically risen between CPT Jackson and MSG Williams based on continued disagreements over their roles and influence with their staff section OIC, Lieutenant Colonel (LTC) Jones, as well as their respective division of labor and workloads. On three occasions in the last two weeks, the tension broke the surface, erupting in the form of heated exchanges during the middle of the duty day. Last night, however, this clash of wills finally became all-out warfare when a lengthy and loud argument began in which MSG Williams screamed a series of profanity-laced jabs at CPT Jackson's professional competence after storming into his office. Three Soldiers, in the ranks of Private First Class, Specialist, and Sergeant, were in the large section conference room that doubled as CPT Jackson's office at the time and witnessed the eruption. CPT Jackson chose not to respond to MSG Williams directly, opting instead to confront his boss, the section OIC. LTC Jones, walking into his own office having just barely survived a two hour-long Battle Update Brief, tersely rejected CPT Jackson's request to formally counsel the NCOIC for disrespect of an officer, a crime under the UCMJ, without explanation. This morning, however, CPT Williams (still seething from the insult) spoke with COL Adams, the Brigade Commander, adamantly expressing his anger at the continued "verbal abuse" at the hands of MSG Williams but cautiously expressing his frustration at the seeming lack of concern by their mutual supervisor, LTC Jones. After dismissing a visibly upset CPT Jackson, COL Adams asked Command Sergeant Major (CSM) Janet Roberts and the Brigade Judge Advocate, Major (MAJ) Joe Martinez, for their advice. COL Adams brought up several issues, to include their ranks, their long history of professional disagreement, the extent to which LTC Jones fit into the problem, and whether the misconduct witnessed by the section's Soldiers warrants serious consideration of adverse action, under the UCMJ.

1. Scope

For the purposes of this article, let us call a proposed mediation process—one which purposefully acknowledges and is built around a command-centric justice system—as the "Commander's Alternative Mediation Program" (CAMP). As described here, it has two broad

components: first, creating a discretionary, pre-discipline¹³⁸ program that permits a commander to offer, and disputing Soldiers to voluntarily accept, a referral to neutral mediation from outside the unit; second, by creating a second mediation resource in some ways parallel to Equal Opportunity (EO) complaint systems, Soldiers may voluntarily participate in the program without command-interference if they believe it may be an advantageous method of solving their relational conflicts. Though this article details the design of this two-pronged system, it is offered only as one *possible* design to demonstrate some of the overarching themes, requirements and individuals involved in such a system. At bottom, because CAMP would operate as an internal dispute resolution tool among volunteer employees against the backdrop of criminal offenses under the UCMJ, it attempts to adopt and blend the procedures and guiding philosophies of both victim-offender and administrative mediation described in Part II.C.

The objective of CAMP is two-fold. First, to provide service-members an opportunity or forum for taking ownership over their dispute in an effort to resolve it. Its second objective is to help the command diffuse a potentially serious conflict before it escalates, demanding (or suggesting) a need for administrative or punitive responses. The process is not intended to guarantee a settlement or agreement each time, though a settlement or agreement is a potential outcome that the disputing service-members may work toward. Because the decision to offer mediation is at the commander's discretion, and the result of the mediation (e.g., a signed agreement by the disputants) does not foreclose other administrative or punitive action by the command, CAMP does not abridge any existing UCMJ authority granted to a commander, and expands the range of resources available in resolving service-member interpersonal conflicts that detract from mission accomplishment and degrade unit cohesion.

Therefore, the CAMP is designed to do two things. First, it provides the unit with an alternative to traditional "administrative corrective measures" and nonjudicial punishment under Article 15. This aspect presumes that some interpersonal, relational, conflicts between Soldiers—while technically punishable under the UCMJ¹³⁹—are more effectively resolved using non-

¹³⁸ Practically, this means any conflict, dispute, or misconduct between Soldiers for which an Article 15 or administrative corrective measure (letters of reprimand, admonishment, counseling, etc.) may be considered by the command team.

¹³⁹ Not all conduct identified as ripe for mediation has devolved into *criminal* conduct *per se*. However, the offenses that materialize from such disputes are characterized by two features: (1) they do not merit punitive discipline or other "administrative corrective measures" *under the circumstances* and (2) they are not

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punitive means in order to strengthen team-building, foster unit cohesion, avoid the stigma of traditional punitive dispositions like criminal convictions, and promote problem-solving at the lowest possible level before the dispute escalates.¹⁴⁰ Second, it provides a service to Soldiers in the same way that a military installation's Legal Assistance office provides general legal advice, services, and support—i.e., when service-members self-identify an interpersonal dispute they believe might be aided by third-party neutral facilitator, this program would provide mediation as an avenue by which they address their conflict in hopes of resolving it without interference or imposition of a solution by the command.

2. *Elements*

This section will describe some of the fundamental components of mediation as a military justice alternative. First, this section presents a broad outline of the two “tracks” that the CAMP could follow, and discusses the factors commanders might reasonably consider when contemplating mediation as a conflict resolution alternative. Additionally, this section also discusses how jurisdictional issues can be resolved, the role of the commander as a veto or ratifying authority, and how confidentiality in mediation may affect military justice decision-making.

i. *Tracks*

effectively resolved using “top-down,” unilateral means to solve the issue. For example, offenses under Article 117 (provoking speech or gesture), 128 (assault), 134 (disorderly conduct), 134 (indecent language), or 134 (communicating a threat) are based on facts that may suggest a resolution through mediation is attainable before the behavior escalates into conduct that *should* be punished in the commander's opinion. 10 U.S.C. §§ 917–934.

¹⁴⁰ In this light, I will draw an analogy: mediation is to Article 15 as Article 15 is to prefferal of charges and courts-martial. Nonjudicial punishment under Article 15 is “ordinarily appropriate when administrative corrective measures are inadequate due to the nature of the minor offense or the record of the servicemember . . . [and] shall be considered on an individual basis.” MCM, Part V.1.d(1). Furthermore, nonjudicial punishment:

may be imposed for acts or omissions that are minor offenses under the punitive articles . . . [“minor”] depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by a court-martial . . . [and deciding] whether and offense is “minor” is a matter of discretion for the commander imposing nonjudicial punishment.

MCM, Part V.1.e.

Under the CAMP, interpersonal disputes and conflict among service-members can be identified in one of two “tracks.” Track 1 consists of command-identified “relational” misconduct: for example, disputes that the chain-of-command observes among particular service-members and would otherwise handle in more traditional ways, such as an Article 15 nonjudicial punishment offer or preferral of charges for court-martial. As discussed earlier, such misconduct might include minor assaults between roommates in the barracks,¹⁴¹ insubordinate contempt or disrespectful language toward an NCO,¹⁴² dishonorably failing to honor a personal debt,¹⁴³ and communicating a threat¹⁴⁴ are examples of such relational misconduct. Track 2 consists of self-identified disputes: disputes and conflicts identified to the chain-of-command by the particular service-member(s) involved. Under the CAMP construct, once a dispute is identified, the commanders who are authorized to impose nonjudicial punishment over the disputants have the discretion to offer the Soldiers a referral to a neutral mediator.

ii. *Initial Disposition Factors*

As explained above in Part III.C., the choice to direct a particular episode of misconduct, which may raise concerns about degradation to unit cohesion, must be guided by the judgment of the commander in light of many circumstances. Mirroring (and expanding) the prosecutorial discretion factors listed in RCM 306, a commander should therefore consider the nature of the conduct, including its effect on “morale, health, safety, welfare, and discipline, the likelihood that the relational misconduct will continue or escalate in the absence of command intervention, the relationship (professional and personal) between the disputing service-members, the prevalence of this misconduct across the unit and any corresponding need for a general deterrent, each disputing service-member’s professional record and the impact that judicial or nonjudicial punishment would have on that record, an assessment of each disputing Soldier’s ability and willingness to participate in mediation in good faith, whether a traditional “administrative corrective measure” is a more appropriate remedy, its foreseeable effect on

¹⁴¹ 10 U.S.C. § 928 art. 128. In particular, “simple assaults” and “assaults consummated by a battery” without punishment enhancers or aggravators. See MCM, Part IV, ¶ 54b(1) and (2).

¹⁴² 10 U.S.C. § 891 Art. 91. See also MCM, Part IV, ¶ 15a(3).

¹⁴³ 10 U.S.C. § 934 Art. 134. See also MCM, Part IV, ¶ 71.

¹⁴⁴ 10 U.S.C. § 934 Art. 134. See also MCM, Part IV, ¶ 110.

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unit cohesion and team-building, recommendations from the subordinate chain-of-command and supervisors, and finally, the unit's operational and training tempo.

iii. *Crossing Command Jurisdictions*

The types of situations likely to benefit from mediation—relational conflicts that may be aggravated by close living and working environments—are those that potentially cause procedural complications under Track 1 of the CAMP. If the disputing Soldiers fall under different UCMJ authorities, questions of proper jurisdiction arise.¹⁴⁵ For example, when the Soldiers are assigned to different companies in the same battalion or Summary Court-Martial Convening Authority, or to different battalions within the same Brigade or Special Court-Martial Convening Authority, there must be a clear identification of a neutral decision-maker to resolve any inconsistent approaches to mediation from the disparate commands. In these situations, all commanders must agree to offer the mediation in order to start the process.¹⁴⁶

If, on the other hand, respective commanders cannot agree, the disputing Soldiers should be provided with an opportunity to appeal to the Commander that exercises authority over these two subordinate commands. If the commanders cannot agree on the utility of mediation in that particular case, and the appellate authority denies the appeal seeking mediation, the process simply reverts to traditional forms of action under the UCMJ. This may, in effect, disable service-members from resolving a conflict in a way they would prefer. However, this loss of control (as perceived by the disputants) should be balanced against the need to sustain the commander's mandated mission to ensure the good order and discipline of his or her forces and his or her MCM-granted jurisdictional authority.¹⁴⁷

iv. *The Commander's Veto*

¹⁴⁵ See R.C.M. 401, Discussion.

¹⁴⁶ Thanks to Colonel Anthony Febbo for noting a relevant concern here: such cross-command coordination is not without practical challenges, especially if one or more of the affected units is deployed, and such difficulty may chill desire to turn to mediation-based solutions. Nevertheless, commanders would naturally consider such challenges under R.C.M. 306 in orthodox judicial decision-making, and it is reasonable to assume that—if such concerns can be overcome prior to courts-martial—this challenge is not insurmountable and simply factors into the command's discretionary choice to offer mediation under the circumstances.

¹⁴⁷ R.C.M. 306(a).

Assuming a commander does turn to mediation as a disposition choice, it is important to note that the CAMP construct would not narrow the options of the commander if the dispute or conflict fails to resolve itself. A commander would still retain the authority to impose administrative corrective measures, nonjudicial punishment, or to prefer charges. Alternative options may be appropriate when:

- disputing service-members choose not to participate in mediation; or
- disputing service-members fail to arrive at mediated settlement in a reasonable time; or
- the mediated settlement agreement is unreasonably inconsistent with the purposes of military law; or
- one or more of the disputing service-members fails to meet the conditions set forth in the mediated agreement, signed by the parties.

This “veto” power should not, however, simply be a form of counter-attack applied when the commander is dissatisfied with the process. If mediation, as a system, is to resolve a conflict in a way that detangles problems at the lowest possible level, frees the chain-of-command from engaging in lengthy and unpredictable punitive efforts, and maximizes the potential for team-building and restoring or strengthening unit cohesion,¹⁴⁸ then the system assumes voluntary participation and a good faith effort to settle, but does not guarantee or impose a mandate to settle. It assumes the terms of any settlement will be in the best interest of the disputing parties and does not require that the best interest of the Army be a factor.¹⁴⁹ So, if the

¹⁴⁸ See *supra* Part I.

¹⁴⁹ A system intended to produce a binary result like a guilty or innocent verdict, or a system which, in a sense, demands the participation of both victim and offender, and a system which—by its very purpose and design—promotes the best interests of the Army is called a court-martial. By its nature, a court-martial can have a splintering or divisive—not cohesive—effect; it burdens the chain-of-command and imposes otherwise unplanned logistical and evidentiary requirements on both leaders and Soldiers, and it funnels a conflict or dispute upward and outward, away from the disputants’ control and into the discretion and eventual judgment of others, be they panel members or judges. While the protection of victims by the blanketing protective embrace of a state’s prosecution of the offender is the common and widely-honored tradition in Western criminal procedure, it is by no means the only viable method by which those interests and victims can be protected. Sometimes, as discussed throughout this article, ensuring that the victim’s right to engineer his or her own “justice” by granting them ownership over the means of dispute resolution is a more fair and appropriate system.

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commander were to take action because the Soldiers chose not to participate, or because they could not agree to a settlement, or agreed but because it was, in the commander's opinion, unreasonably inconsistent with the purposes of military law, then the commander is undermining the very purpose and value of the mediation process; the commander should have never opted for this route as an initial choice.

v. Confidentiality

One significant concern often raised about a mediation program is the problem of what information, shared during a mediation session, ought to be "privileged" or confidential. If a mediation fails to resolve the dispute, can the prosecution or the opposing party use statements or admissions made during mediation against the party making it? Ultimately, the issue is one of balancing the interests of privacy—perhaps one of the factors influencing the person to seek a mediated solution in the first place—against the "public" interest in presenting the fact-finder with probative evidence for use in adjudication.¹⁵⁰

A related question is the extent to which "admissions"¹⁵¹ may be relevant and admissible at a subsequent judicial hearing regardless of the mediated outcome. In this vein, a derivative issue is whether the mediator can or should be available as a witness against one of the parties during subsequent legal proceedings.¹⁵² Should there be a mediator-disputant privilege in the same form as a psychotherapist-patient privilege to help ensure mediation is meaningfully confidential in a way that parties likely expect?¹⁵³

¹⁵⁰ See, e.g., *National Labor Relations Board v. Macaluso*, 618 F.2d 51, 54 (9th Cir. 1980).

¹⁵¹ Under the Military Rules of Evidence, an "admission" is a "self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." See MIL. R. EVID. 304(c)(2).

¹⁵² See, e.g., Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988).

¹⁵³ MIL. R. EVID. 513 provides a patient, who has received services from a psychotherapist, with the privilege of refusing to disclose, and precluding that psychotherapist from disclosing, any confidential communication that the patient made in the course of facilitating diagnosis or for the purpose of treating his or her "mental or emotional condition."

One solution to this problem is a generally applicable privilege granted to all the parties, including the mediator.¹⁵⁴ That is, each party (or the mediator) can refuse to disclose any “mediation communication,” and prevent others from disclosing such information for the purpose of admissibility of evidence in a legal proceeding or during the discovery phase of that proceeding. Not only is this privilege analogous in many ways to the common-law derived privileges between certain types of parties we find in the Rules of Evidence,¹⁵⁵ but such a disclosure rule is similar to existing walls that both federal and military law erect around certain kinds of conversation, like “compromise negotiations,” which shield statements made from being used as proof of liability (though other uses may be permissible).¹⁵⁶

Notwithstanding these protections, the wary commander worried that the CAMP scheme would provide too much opportunity for the spiteful or mischievous disputant to “game” the system could take solace in that this privilege could be waived, affirmatively by the parties, assuming all consent (“I waive my privilege against disclosure”), or through misconduct during the mediation session (e.g., using the session to plan, attempt to commit or commit a crime [e.g., threatening to inflict bodily harm on another] or conceal an ongoing criminal activity).¹⁵⁷

Granting such a privilege, or establishing a rule of confidentiality, can be justified on several grounds. It creates an incentive to engage in a problem-solving discussion—if a party believes its dispute is too private, or embarrassing, a provision for confidentiality encourages sincerity and

¹⁵⁴ See, e.g., the Uniform Mediation Act, §§ 4–6 (2003), <http://www.mediate.com/articles/umafinalstyled.cfm> (a collaborative effort between the National Conference of Commissioners on Uniform State Laws and the American Bar Association’s Section on Dispute Resolution).

¹⁵⁵ See, e.g., MIL. R. EVID. 502 (“Lawyer-client privilege”), 503 (Communications to clergy), and 504 (Husband-wife privilege).

¹⁵⁶ See FED. R. EVID. 408(a) and MIL. R. EVID. 408(1). One clear illustration of just how protective this shield is *U.S. v. Jenson*, 25 M.J. 284 (C.M.A. 1987), in which the appellate court reversed a trial court’s conviction of an Army Specialist accused of sodomy and rape in part because the trial judge erroneously admitted a pre-trial settlement agreement into evidence for the prosecution.

¹⁵⁷ Creating and enforcing an independent duty to disclose and report threats to others made during a mediation is a common practice in many states, and is modeled after the reasoning in the famous case of *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976): a reasonable belief that disclosing the mediation communication would be necessary to prevent a party from committing a crime likely to result in substantial physical harm would trigger such an affirmative duty.

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frankness.¹⁵⁸ Second, it broadens the scope of the conversation. Deliberately expanding the menu of topics open for discussion—beyond the specific manifested conflict—is a tactic often employed in negotiation in order to discover potential areas where agreement is more probable, which may later support a more robust agreement that encompasses the original “target” issue. A provision for confidentiality could reduce the normal fear that acquiescence, accommodation, or acceptance of certain arguments might later be used adversely against them in court, and with that safety net in mind, participants may work more cooperatively toward a mutually-acceptable solution.¹⁵⁹

These values, arguably, outweigh their competition: an open-ended or unrestricted use of mediation statements as possible evidence later on at trial would simply chill the disputant Soldiers’ conduct toward one another, freezing it to a point indistinguishable from an adversarial litigation.¹⁶⁰ Confidentiality, enforced through an evidentiary privilege of some scope, is a promise laced throughout the very structure and intent for mediations; without some mechanism to ensure privacy, disputant Soldiers and commanders would find it “appreciably more difficult to achieve the goals of mediation.”¹⁶¹ How wide or narrow that scope of the privilege may be is a question that deserves future thought and ample discussion. Specific challenges to confidentiality, based on the assumed consequences of privilege rule, are taken up in Part IV.B.

vi. Procedure

The fundamental purpose of an institutionalized mediation system, such as the CAMP construct, is to provide an avenue for commanders and disputing Soldiers to siphon off certain conflicts before they escalate to the point where punitive action becomes advisable. The CAMP retains the commander’s authority to (1) not offer mediation; (2) withdraw an offer; (3) terminate the mediation during the process for good cause; (4) effectively veto the Soldiers’ agreement; and (5) initiate administrative corrective

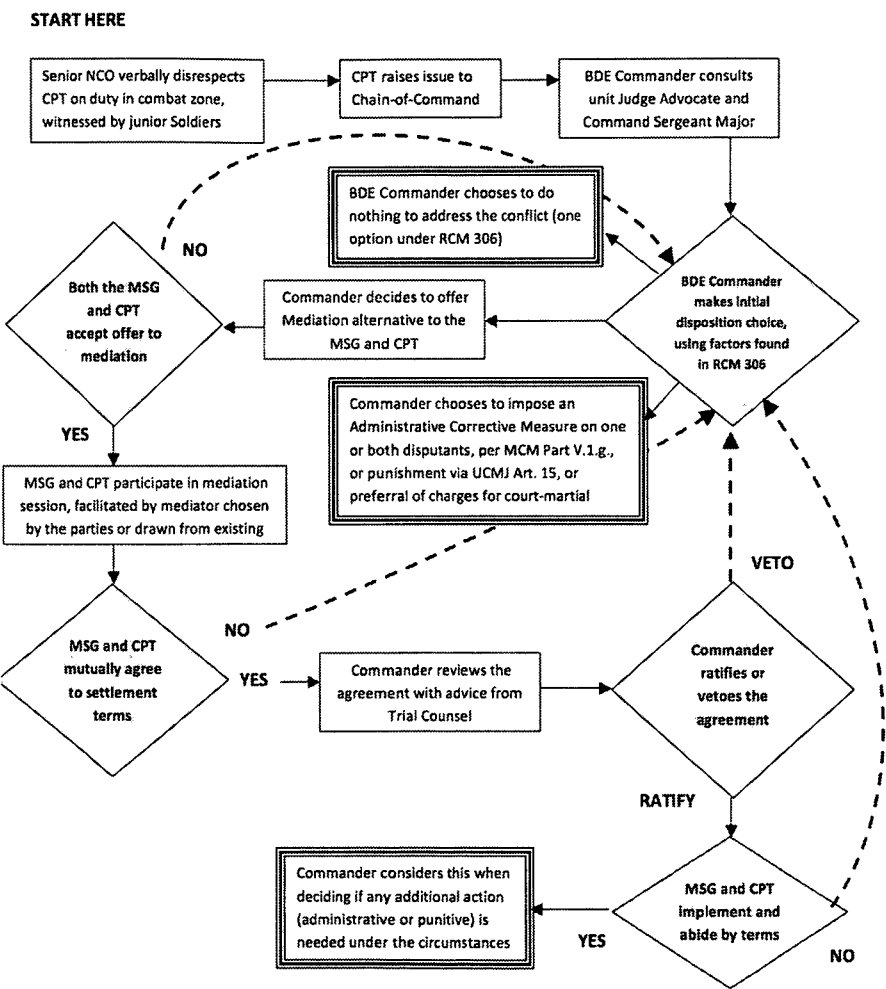
¹⁵⁸ See Prigoff, *supra* note 152.

¹⁵⁹ Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest*, 1995 J. DISP. RESOL. 1, 15–17.

¹⁶⁰ *Id.* at 17 (“Candor is the dynamo that drives mediation.”).

¹⁶¹ See *Olam v. Congress Mortgage Company*, 68 F.Supp. 2d 1110, 1133 (N.D. Cal. 1999) (citing *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (Cal. Ct. App. 3d 1998)).

measures, nonjudicial punishment, or UCMJ actions based on the circumstances and facts then known. Furthermore, because the CAMP operates outside the conventional MCM processes, such a mediation session does not constitute a form of pre-trial agreement and does not implicate the need for immunity from the General Court-Martial Convening Authority.¹⁶² The process and decisionmaking nodes of Track 1 are illustrated in Figure 1 below, applied to the hypothetical at the beginning of Part IV.A.



¹⁶² See R.C.M. 704 and 705.

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Figure 1: COMMANDER'S ADJUDICATION THROUGH MEDIATION (Track 1, CAMP)

In the illustration above, I depict a generic decision sequence that charts command-identified disputes through the mediation process, or Track 1 of CAMP. Just as with generic mediation in a criminal law context, the frequency and scope of decisions by the disputing Soldiers themselves distinguishes this process from traditional military justice decisions by the command. Once the commander has opted¹⁶³ to offer mediation to MSG Williams and CPT Jackson, the Soldiers in the opening hypothetical, both of these disputants have the ability to accept or reject the offer, much like a Soldier has the ability to accept punishment under Article 15 or to reject it, forcing the commander to drop the issue or prefer charges for a court-martial. Unlike the Article 15 analogy, however, a choice to reject the mediation offer simply returns the disposition decision to the hands of the commander, at which point he or she has the same extensive menu of choices and discretion they currently possess under military law.

There are also three other occasions when the decision falls back to the command. Assume the parties agree to mediate. Despite the efforts of the mediator to aide them in identifying areas of common concern and building ways to mutually resolve their conflicts, the parties cannot agree to terms. At some point, the parties themselves or the mediator must see that further efforts—even if made in good faith—simply will not be fruitful and may end up being counterproductive. Consequently, this commander-referred mediation session closes unresolved, returning the dispute back to the commander for action, or no action.¹⁶⁴

Or, assume that the parties do come to an agreement that they believe satisfies their concerns. In order to ensure that the agreement does not impose some unlawful obligation or burden on one or both parties, and to ensure that the agreement is “warranted, appropriate, and fair,”¹⁶⁵ and does

¹⁶³ After consideration of the factors listed in R.C.M. 306 and the modified factors described in Part III.C., *supra*.

¹⁶⁴ An often-underappreciated fact about the discretion afforded to commanders is that they can, legally, choose to take *no* adverse action against a Soldier in their “jurisdiction,” regardless of the gravity of the offense. *See* R.C.M. 306. Whether the next higher commander disagrees and withholds disposition over that Soldier or offense is another matter. Even experienced commanders are not immune from assuming they must address a conflict or misconduct with direct and swift action—whether administrative or punitive.

¹⁶⁵ R.C.M. 306.

not undermine the overall sense of good order and discipline within the unit, the commander has the opportunity to review the agreement.¹⁶⁶ If he or she believes the agreement invades these interests, then that commander may “veto” the agreement, returning the conflict back to their innate discretion for another choice.

Or, alternatively, assume that the parties have agreed to terms and the commander has “ratified” the agreement and deems it fair and appropriate under the circumstances because it reinforces good order and discipline. Yet, at some future point, one or both of the parties “breaches the contract” of the settlement and fails to abide by their mutual agreement. Depending on the same RCM 306 factors that guide commanders whenever faced with evidence of an offense, and the same factors relied upon in deciding to send the issue to mediation from the start, then—once more—the dispute retreats back to the hands of the commander for a disposition choice.

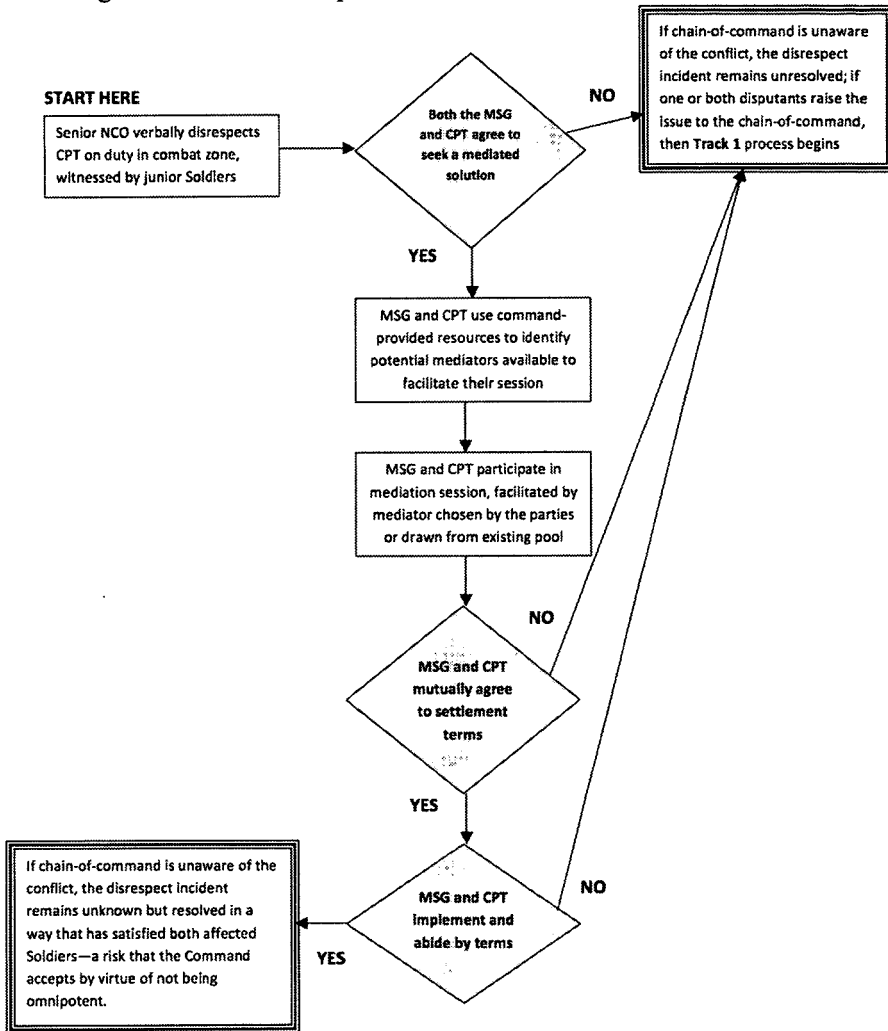
In contrast to Track 1, Soldier-identified disputes could be resolved through mediation separate from the chain-of-command, which would be known as Track 2. The chain-of-command remains largely detached from investigating or disposing of the misconduct unless the parties are dissatisfied with the bargain, or if there is a “breach” of the agreement at some future point. One or both parties, for any of these reasons, may resort to notifying the chain-of-command. This notification would then trigger either command-imposed mediation, or any other appropriate disposition. The Track 2 process is illustrated below in Figure 2.

This illustration depicts a generic decision sequence that charts *Soldier*-identified disputes through a mediation process. It is important to recognize the dominant feature of bilateral or mutual decision-making between the disputing Soldiers that does *not* involve a disposition decision or investigation by the chain-of-command. There are, at least as depicted in this version, three decision points (depicted by gray diamonds)—all of which

¹⁶⁶ Another area for discussion is whether (and to what extent) the commander should rely on legal counsel from a servicing or organic Judge Advocate when reviewing the agreement. Further questions spring naturally from that answer: should the Judge Advocate be a different attorney than the one initially advising the commander, or should the attorney be one other than the trial counsel to preclude a potential conflict or appearance of bias should the dispute devolve into a traditional court-martial? To what extent should the attorney’s review become “part of the file” as it does for a legal review of an investigation conducted under AR 15-6 or AR 735-5? Should an unbiased Judge Advocate be present during the mediation to advise the mediator analogous to a Separation Board’s non-voting legal advisor under AR 635-200 (“Active Duty Enlisted Administrative Separations”) or 600-8-24 (“Officer Transfer and Discharges”)? Or as impartial advisor to either disputant? Or as the mediator themselves?

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involve the disputing Soldiers and none of which include the Command. Under this track, mediation is an additional legal dispute resolution option which operates entirely outside the commander's "judicial function" and authority.¹⁶⁷ Viscerally, this disconnecting of the commander from the disputing Soldiers' conflict may seem like an anathema; without the problem being illuminated for a commander, one could argue, the unit's ability to enforce good order and discipline is blinded.



¹⁶⁷ See *supra* note 93.

**Figure 2: COMMANDER'S ADJUDICATION THROUGH MEDIATION
(Track 2, CAMP)**

Indeed, when a Soldier files a restricted report of a sexual assault with certain agencies or officials on a military installation (Sexual Assault Response Coordinator, victim advocate, chaplain, or a healthcare provider), commanders are not notified and do not possess this information.¹⁶⁸ This reporting shield allows the Soldier to receive medical treatment and follow-up care while bypassing the chain-of-command and military law enforcement investigations—at least giving the victim an opportunity to determine the scope and extent to which they wish to trigger or to participate in an investigation.¹⁶⁹ While the crime may go uninvestigated and ultimately unpunished, the victim of the crime may achieve what he or she believes to be the appropriate degree of attention and reconciliation. What the chain-of-command loses in deterrent effect and retribution, it gains in fostering the trauma victim's sense of individual case ownership and healing.¹⁷⁰ This same balancing process would be present within a mediation alternative that diverts or shields misconduct from the eyes of the chain-of-command.

In sketching out the rough parameters of both tracks in this proposed CAMP system, this article addresses some of the primary attributes that distinguish it most sharply from traditional military justice approaches. Nevertheless, even necessary or foundational elements of such a system—the involvement of the commander in the initial disposition offer or the extent of confidentiality—are subject to gradation and could be molded into any number of alternative shapes and designs. Regardless of CAMP's final configuration, though, any institutionalization of a new system is necessarily confronted by the existing system's natural inertia. Addressing and appraising the most significant potential criticisms of institutionalizing mediation is the challenge taken up below in Part IV.B.

3. Open Questions

Some obvious logistical hurdles are not addressed in this article but would certainly require planning and resourcing if CAMP were to be seriously considered. One could argue, for instance, that a local Office of the Staff Judge Advocate (even at an installation that supports a Corps or

¹⁶⁸ See AR 600-20 (Army Command Policy), ¶ 8-4c.

¹⁶⁹ *Id.* at Appendix H, ¶ H-4a.

¹⁷⁰ *Id.*

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Division) currently lacks the personnel to effectively manage and supervise such a program. A brief rejoinder: CAMP could easily be designed as a pilot program intended, in part, to identify necessary resources for eventual expansion. As a test program, CAMP would not unduly burden existing personnel resources in even a moderate or average-sized SJA office. The obvious purpose in recommending a trial period with a test unit (maybe as small as a company or battalion) is to gather data on logistical challenges impeding a successful program before it expands, if at all.

The pilot program could identify and explore various options and reformulations of the numerous procedural decisions that lead into, or result from, the mediation session (as sketched out in Figures 1 and 2): where to mediate?¹⁷¹ And does the decision change depending on which “Track” is used? How to train neutral Soldiers in the techniques of mediation (and from what ranks should they be drawn)?¹⁷² And how should the mediator’s rank compare to the mediating disputants, and how to protect rank from creating conflicts of interest, and how to prevent one disputant’s rank from being an “expression of power and domination” toward the other, lower-ranking disputant?¹⁷³ How much time to allow for mediation before lack of progress justifies resorting to other, traditional, methods? Should the mediator selection process factor in the mediator’s (or the Soldiers’) gender, or race, or Military Occupational Specialty, or any other identifying characteristic or experience? Should mediator qualifications mirror those of court-martial panel members?¹⁷⁴ Should there be a selection process at all, or should selection depend on the preference of the disputing Soldiers? What role should the unit’s servicing Judge Advocate or legal advisor play? Should the commander permit the disputants to bring legal counsel with them to the

¹⁷¹ Selecting a location for a mediation would depend on the availability of space that is private (and therefore conducive to the frank communication necessary for effective problem-solving) and easily accessible to both parties wishing to mediate, and that reinforces the neutrality of the mediator, and does not unreasonably detract from the mediating Soldiers’ ability to train or perform other military duties.

¹⁷² See, e.g., Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 781–84 (1996).

¹⁷³ See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 11 (1991).

¹⁷⁴ 10 U.S.C. § 825(d)(2) (2012). Theoretically, a court-martial convening authority, with the help of subordinate commanders and his or her Office of the Staff Judge Advocate, select those Soldiers and officers “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”

mediation?¹⁷⁵ And once a lawyer is present, how much advocacy—rather than subdued consultation—should be permitted? How do the procedures change if more than two disputants are involved? If the procedures change, are substantive rights impinged—if so, to what extent? Should each unit maintain its own cohort of qualified mediators as a standing pool for a discrete time, in the same way that a General Court-Martial Convening Authority maintains standing lists of court-martial panel members under Article 25, UCMJ?¹⁷⁶ Could, or should, mediators be civilians—if so, should they be limited to Department of Defense employees, or might a unit “outsource” for mediation talent beyond the gates of the Post? What if one disputing Soldier is willing to hire a professional civilian mediator—can they seek contribution for the cost from the other Soldier? Should the Commander also be afforded discretion on approving of the mediator? Must the mediated agreement be in writing? How would the CAMP process function—or will it not function at all—in an extended field or training environment? What challenges would remain or disappear if CAMP were transplanted to deployed environment?

Some of these additional questions—the answers to which may have a degree of influence over the both the process and substance of a mediation and the rights of the disputing Soldiers—are addressed in the Appendices that follow the main body of this article. Appendix A is a “script” that a commander may follow when offering mediation to the disputing Soldiers under Track 1 of CAMP. It is largely mirrored on the standard and widely-used Article 15 script. This document allows the commander to explain mediation to the Soldiers in such as to give them fair notice of the procedure and what the costs and benefits are likely to be. It attempts to educate the Soldier on expected conduct during the mediation, potential results of the mediation, the confidential nature of the mediation, and the ratifying role that the commander maintains throughout the process. The script’s objective is to

¹⁷⁵ See Uniform Mediation Act, Section 10 (“An attorney or other individual designated by a party may accompany that party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.”) In contrast, a mediator in California family courts has the ultimate discretion to exclude attorneys if “appropriate or necessary.” See Cal. Fam. Code Section 3182.

¹⁷⁶ See Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992); 10 U.S.C. § 825(d)(2) (2012). A derivative question is whether any standing pool should also include mediators qualified based their unique experiences that may parallel those of the mediating parties or may make them particularly well-suited for a being a mediator—in effect, creating a “blue ribbon” pool of potential neutrals.

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ensure that the Soldier's acceptance of the offer is knowledgeable, intelligent, and voluntary. Appendix B is a template for an "Agreement to Mediate," designed to confirm that the Soldier accepts the mediation offer in a way that clearly demonstrates that it was based on a thoughtful and voluntary consideration of the facts and attributes of mediation. Like the commander's script, it reinforces the attribute of command discretion throughout the process, and acknowledges acceptance of the potentially adverse consequences should the Soldier fail to participate in good faith, or fail to adhere to the mutually agreed-upon terms. Appendix C is a template for a "Mediated Agreement," designed to provide the disputing Soldiers an opportunity, with the assistance of the mediator, to articulate the settlement they have mutually reached, and re-acknowledges the ratification and veto power of the commander.

Mediation represents an unconventional, but potentially innovative, approach to resolving certain disputes and conflicts among Soldiers "using new forms within old structures."¹⁷⁷ By building this option into the pre-disciplinary decision-making process (Track 1), commanders improve their choice of options to deal with conflict. By providing mediation as a resource for self-identifying Soldiers (Track 2), commanders send clear signals that problem-solving need not be solely implemented by the command, but that Soldiers can have a chance to resolve lower level conflicts that might detract from their professional and personal development. In either case, this program has significant potential to free up valuable time and resources, to promote durable problem-solving at the lowest level, and to foster better communication, team-building and mission success. This alternative approach to finding the most "warranted, appropriate, and fair"¹⁷⁸ decision expands the disposition authority of commanders without unreasonable cost.

B. Mediation and its Discontents: Addressing Plausible Military-Specific Constraints and Criticism

1. The Infringement Argument: Mediation Interferes with and Impedes the Commander's Use of Traditional Disciplinary Mechanisms Under the MCM

To prove mediation is an unreasonable interference with currently lawful command authority, its procedures or outcomes must either (1) limit the

¹⁷⁷ See Menkel-Meadow, *supra* note 173, at 3.

¹⁷⁸ R.C.M. 306.

choices afforded to commanders and thus countermand the Rules for Courts-Martial; or (2) unreasonably balloon Soldiers' rights to such an extreme that commanders lose their authority to dispose of misconduct, again in violation of basic tenets of military law and order. But an appropriately-designed mediation alternative need not fall into either trap.¹⁷⁹ A mediation system driven by multiple "decision-points" and multiple actors would, in effect, expand the choices and widen the discretion for commanders. Such a system could be viable at any point after the command has taken administrative or punitive steps, such as counseling or nonjudicial punishment, or before it has begun to consider using such measures. In other words, there are multiple "decision points" at which time a commander may refer a case to mediation, none of which preclude the command's traditional recourses under the MCM. If, for example, the disputing Soldiers fail to agree, or if the commander is dissatisfied with the agreement they do make, the commander may still exercise any other option that he or she believes stands a better chance at resolving the matter—even if it means a unilateral imposition of an adverse action on one or all of the disputing Soldiers.

It may be helpful to analogize the CAMP as an "administrative corrective measure," like written counseling sessions from the leaders, rehabilitative transfers, corrective training, admonishments, and letters of reprimand. Mediation is simply another alternative within the long list of available recourses that a chain-of-command may consider. Conceptually, it fits squarely within the language of the MCM:

Article 15 and Part V of this Manual do not apply to include, *or limit* use of administrative corrective measures that promote efficiency and good order and discipline *such as* counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges.¹⁸⁰

This section of the Manual for Courts-Martial (notably, the use of "such as" before listing several forms of corrective measures) leaves room for creative application of a commander's authority to solve problems with specified or unspecified measures.¹⁸¹ While this list only includes traditional

¹⁷⁹ See Appendix A.

¹⁸⁰ MCM, Part V, ¶ 1(g). (emphasis added)

¹⁸¹ Compare Lieutenant Colonel Robert R. Baldwin, *Disciplinary Infractions Involving Active Guard/Reserve Enlisted Soldiers: Some Thoughts for Commanders and Judge Advocates*, ARMY LAW., Mar. 1986, at 8–10 (discussing administrative corrective measures and discipline options provided to Reserve Component Commanders

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“top-down” or unilateral, command-driven solutions, there is nothing in this provision that prevents the use of unconventional problem-solving techniques provided that they “promote efficiency and good order and discipline.” In this sense, the CAMP construct can be thought of in terms of an “administrative corrective measure” and—just as with the traditional examples—mediation neither supplants nor restricts a commander’s discretionary authority to use any or all other means permitted. Nor does it unjustifiably expand Soldiers’ rights to the detriment of command authority. For example, the commander may “veto” or “ratify” a mediated agreement, as well as initiate other measures as the context demands (this is discussed above in Part III). The CAMP framework merely provides a different procedure for sending the same message but achieving potentially better results than the more traditional tools for ending Soldier-to-Soldier disputes. There is no interference, therefore, emanating from the CAMP’s processes that unreasonably cloud a commander’s traditional authority.

2. The Blurry Heuristic Argument: Where Should Commanders Draw a Line Between Mediation-Appropriate Fact Patterns and Mediation-Inappropriate Crime?

There is no bright line. The appropriate standard, on a case-by-case basis, is a “totality of the circumstances” analysis. Rather than giving commanders a clear rule for when mediation may be appropriate, commanders should look to the situation holistically to decide whether or when mediation may be appropriate. This imprecise but flexible standard is no different from the majority of administrative and punitive decisions currently available under the *MCM*. In the context of deciding among nonjudicial punishment under Article 15, administrative corrective measures, or charges under the UCMJ, the only guidance commanders have in using their discretion is that it should be considered on an “individual basis” after considering “the nature of the offense, the record of the servicemember, the needs for good order and discipline, and the effect of nonjudicial punishment on the servicemember and the servicemember’s record.”¹⁸²

responsible for Active Guard Reserve (AGR) Soldiers), and AR 27-10, ¶ 3-3(a) (using the language “[i]ncluded among nonpunitive measures are . . .”).

¹⁸² See MCM Part V, ¶ 1(d)(1). The drafter’s “Discussion” of R.C.M. 306(b) lists several more factors a commander should consider in disposing of charges, including possible motives of the accuser, reluctance of the victim to testify, cooperation of the accused, concurrent jurisdiction with civilian authorities, and the availability or admissibility of evidence in the case.

Rather than a liability, this lack of a “bright line” standard is considered a strength in the military justice system because of the elastic set of possible responses provided to the commander. Whether we view mediation in the CAMP construct as another illustration of an “administrative corrective measure” or as a wholly new option equal to any other disposition choice, the same kind of guidance can and should direct a commander’s decision-making.

To this end, the CAMP construct provides the commander with a list of ten factors to consider before making an offer of mediation (see Part III.C., *supra*). These factors are derived from the MCM’s discussion of commander discretion under an Article 15 and the factors described in RCM 306, but relates them to the context of mediation. One factor, for instance, is the professional and personal relationship between the disputing Soldiers. For cases in which the Soldiers neither work closely together, nor have any customary or personal relationship for which efforts should be made to rebuild or sustain, mediation may not be appropriate and commanders should instead consider other options. If, however, such a relationship does exist, how the dispute originated may influence the means by which the command resolves it. Another factor commanders should consider under CAMP, but not necessarily under traditional RCM 306 decision-making, is whether unit cohesion and team-building—i.e., another way of saying strong interpersonal relationships—might be disrupted by imposing traditional command-driven discipline.

3. *The Cloaking Misconduct Argument: Rules of Confidentiality Shield Bad Behavior from the Command*

Mediation may keep some facts or statements from the scrutiny of the command and may be unavoidably lost for use as admissible evidence at a later court-martial. This is not nearly the calamity it may appear to be at first blush. It is fundamentally the same protection we already afford to incriminating statements that have been coerced or were made in the absence of Article 31 warnings.¹⁸³ MRE 408, as an analogy, also shields “evidence of conduct or statements made in compromise negotiations.” Likewise, incriminating statements made during “privileged communications” between husband and wife, lawyer and client, and clergy and penitent are shielded.¹⁸⁴ While in those cases the prosecution of a crime becomes potentially more

¹⁸³ See 10 U.S.C. § 831 (2011).

¹⁸⁴ See MCM, Appendix 22, Section V.

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challenging or impossible, the interests protected are considered to outweigh their evidentiary utility: in other words, just as in MRE 403, the probative value is outweighed by more substantial competing interests, like protecting the maker of the statement from unfair prejudice or confusion of the issues.

The fact that incriminating content of a mediation dialogue may be screened from view is largely irrelevant in light of two foundational aspects of CAMP: first, the built-in discretion afforded to the commander; second, confidentiality provisions that trigger or permit disclosure of content in relevant situations. In the command-referred version of CAMP (Track 1), mediation only begins if the commander chooses it (Figure 1, *supra*). It is a discretionary approach that can be used in lieu of, or in addition to, traditional measures. If a commander chooses to refer the dispute involving interpersonal misconduct to mediation in lieu of other discipline, the commander does so after considering numerous factors and the general standard described above and thus has determined that the risk of losing evidence for some undetermined or potential future case is outweighed by the benefits and advantages of mediation. For example, what the commander loses in terms of potential admissions (defined in MRE 304(c)), he or she may gain in fast, durable settlements of conflict. Alternatively, if a commander chooses to offer the mediation referral in addition to other forms of corrective action or discipline, he or she has already built a record on which to substantiate that disciplinary action, and therefore has little need for any potential evidence that might accrue as a result of the mediation conference. As a result, the confidentiality of a mediation proceeding does not hamper the government's ability to collect evidence for later use.

Likewise, evidentiary concerns are ameliorated in Soldier-identified disputes (Track 2). The self-identified version of CAMP mediation is closely analogous to the Army Substance Abuse Program (ASAP).¹⁸⁵ The Army has institutionalized a normative trust that the results of certain biochemical testing for alcohol and drug abuse, categorized as "limited use" evidence, should be largely unavailable for legal proceedings or is of narrow usefulness at an administrative hearing.¹⁸⁶ The stated objective for this program is to "facilitate the ID of Soldiers, who abuse alcohol and other drugs by encouraging ID through self-referral [and] to facilitate the rehabilitation of those abusers who demonstrate the potential for rehabilitation and retention."¹⁸⁷

¹⁸⁵ See AR 600-85.

¹⁸⁶ *Id.* at ¶ 10-11.

¹⁸⁷ *Id.* at ¶ 10-11.

ASAP's objective is similar to the purpose of CAMP's Track 2, which is designed to encourage disputing Soldiers (who may have engaged in misconduct stemming from an interpersonal dispute) to self-identify and affirmatively work toward a resolution with an eye to rehabilitation of the interpersonal relationship. In both scenarios, the Army benefits by developing safer, more stable, Soldiers and more cohesive teams notwithstanding the earlier misconduct, drug use, or conflict. ASAP's general approach to confidentiality (limiting knowledge of the Soldier's participation to a select few leaders and program staff and prohibiting certain results from use in court or for some purposes in administrative hearings)¹⁸⁸ is a good model for the confidentiality necessary for effective mediations.

Nonetheless, it is reasonable to presume certain conditions will call for a good faith use of relevant statements or facts learned only through a mediation session. Both the Federal Rule and Military Rule of Evidence 408 provide for the admissibility of statements made during "compromise negotiations," if offered to prove bias, prejudice, or obstruction of an investigation or prosecution. Mediation in the UCMJ context can certainly be engineered in such a way as to allow for the waiver of a confidentiality protection. Waiving confidentiality could mirror ASAP's approach: ASAP counselors may reveal to the command or other proper authority knowledge of illegal acts that impact the mission, national security, or the health and welfare of others.¹⁸⁹ CAMP, likewise, could endorse a confidentiality rule that provides a justification for disclosure. Adopting the Uniform Mediation Act (sections 4–6) approach, for instance, would presume confidentiality applicable to all parties, waivable either directly and by uniform consent, or through misconduct during the mediation session itself. Some statements may be intriguing enough to pique the mediator's concern: e.g., statements that indicate one or more Soldiers are planning a crime: attempting to commit or committing a crime; or are concealing an ongoing criminal activity. Such statements would not be shielded by the general rule of confidentiality, and would be a risk that the Soldiers knowingly volunteer to accept when they agree to mediate (Appendix 2). As a result, these statements would be admissible as a hearsay exception in a subsequent legal proceeding under MRE 804(b)(3) ("statements against interest"); the mediator may be called to recount the statement and which could be admissible under MRE 304(h)(1) ("voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the

¹⁸⁸ *Id.* at ¶ 6-7(a).

¹⁸⁹ *Id.* at ¶ 10-12(b).

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accused make it, even if it was reduced to a writing and the writing is not accounted for”).

Therefore, CAMP neither unduly burdens the investigative and disciplinary tools available to the command, nor precludes appropriate disclosure if necessary for future criminal proceedings against one or both of the mediating parties.

4. *The Underdeveloped Law Argument: Military Common Law Will Grow Stagnant Without the Constant Watering of New Cases*

Another concern associated with ADR approaches is that systems like mediation prevent trial and appellate judges from weighing in and thus applying, expanding, or diminishing case law that interprets common law principles or statutory prohibitions. This observation is, no doubt, true and grounded in reality. Fewer cases decided by judges and juries will yield fewer appellate decisions, and thus a smaller reservoir of facts on which the common law will develop. However true, it is a red-herring in that it distracts us from the real question raised by proposing mediation as an alternative complement to orthodox justice: is a given fact-pattern appropriately decided by the venue of a court-martial, or nonjudicial punishment, or administrative corrective measure, or mediation, under the case-specific circumstances?

If this “underdeveloped law” argument were at all persuasive, the growth and universal reliance on nonjudicial punishment across all armed services for minor offenses would not be continually promulgated by executive orders in version after version of the *MCM*, or acquiesced to by the military courts. Clearly, the nature of military justice—as discussed above, philosophically guided by the principles of military discipline for mission-accomplishment and commander-prerogative—has traditionally justified the use of criminal procedures even when those procedures may otherwise avoid appellate review and the evolution of the law.

Moreover, nothing within a mediation system—including CAMP—necessarily precludes military legal advisors from convincing commanders that the interests of justice (to include the assumed future evolution of the law) would be better served through the uncertainty and duration of trial litigation rather than mediation. Ultimately, given the intrinsically vital role that commanders play in the current military justice system, the *ex ante*

concern about mediation malnourishing the law writ large is equally unpersuasive and unsupportable.

5. The Superfluous Argument: Military Leaders as Innate Mediators

CAMP could be condemned as unwanted leadership by some other name. Leaders are expected to be highly invested in their Soldiers' lives and should already be performing the job of an informal "mediator" as part of the basic skill set expected of Noncommissioned Officers and Officers. However, existing disciplinary tools under the *MCM* also mirror leadership responsibilities, making this criticism not particularly weighty. Generally, military leaders are expected to engage in individual and group mentoring, counseling, and problem-solving. The CAMP scheme is not a substitute for, or an unnecessary addition to, basic leadership actions, just as *MCM*-approved tools do not replace basic leadership actions. For example, verbal counseling, written counseling, admonishments, letters of reprimand, and Article 15 nonjudicial punishment give leaders a way to articulate the command's attentiveness to a problem and provide a way to craft solutions to interpersonal conflicts and disputes that otherwise diminish the ability to accomplish their mission or impede the unit's readiness.

These tools are similar to the skill set we hope that leaders already employ: the articulated communication between leader and Soldier (using these tools) is precisely what should be happening "off line" as part of a leader's effort in developing the professional competence of his or her team. Yet, when used properly, these mechanisms are considered invaluable tools that augment and reinforce other means that commanders may use to promote justice and enforce discipline within their formations. But, as described above, there are some cases that benefit more from a mediated resolution than they would from command-imposed solutions: specifically, relational-based conflict based on underlying interpersonal tensions that would not necessarily be resolved through a commander's judge-like decision under traditional UCMJ authority. Rather than resorting to traditional punishment as a blanket solution for the misconduct that is triggered by such conflict, the CAMP framework gives commanders criteria to determine whether the problem is really of a type that could be resolved using mediation. Moreover, mediation enables the Soldiers, in appropriate situations, to "police themselves" from the bottom-up rather than imposing solely "top-down" solutions.

In this way, the CAMP scheme is likely to be a time- and resource-saving mechanism as contrasted against generic court-martial preparation or

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formal investigations: no need for gathering admissible evidence, interviewing witnesses, pulling military witnesses away from their duties, or assigning military personnel for courtroom-related support. Moreover, the reality is that much misconduct and many disputes are simply outside the ability of the leadership to resolve. In many situations, for example, the chain-of-command and other key leaders simply have other mission-related priorities: higher visibility criminal activity or disciplinary needs, training or deployment preparation, or actual combat operations in a theater of war. Such priorities restrict the time and resources they can reasonably devote to “lower visibility” misconduct and systemic interpersonal conflict. These scenarios may often be placed in the commander’s “put off until another day” file, resulting—often—in a continuation or escalation of conflict.¹⁹⁰

The CAMP framework, on the other hand, provides leaders with a way to maintain situational awareness of these problems, while still directing the conflict into the most efficient avenue for resolving it, at the earliest available opportunity.¹⁹¹ As a consequence, commanders may be able to craft and transmit a message that the leadership is involved and ready to aide Soldiers in preventing these “mission distracters” from worsening. Soldiers, receiving this message, are signaled that the command climate is flexible and creative, and able to work for the Soldiers’ benefit. The result is not a hand-off of key leader responsibilities to a faceless and alien system; rather, the CAMP scheme only reinforces that pre-existing duty and provides the leader with an effective way to execute it.

Another effective method, as an alternative to a formal system like “CAMP,” is providing instruction on mediation skills and neutral party intervention to leaders. A system design approach, as advocated in this article, need not be the only way in which mediation finds a home within traditional military justice. In fact, it may not even be the easiest or most efficient way. Designing an effective structure, through which *stakeholders* (i.e., victims, offenders, the commander, and the unit as a whole) are able to present their interests and positions in a way that is consistent with underlying *goals* of the system takes time, resources, and a fair amount of

¹⁹⁰ This prediction of time and resource-saving is based on observations drawn from personal experience and discussions as a platoon leader, battalion staff officer, Trial Counsel, and Command Judge Advocate.

¹⁹¹ Efficiency and economy of resources drive the treatment of “disposition of charges” in R.C.M. 306—i.e., providing the immediate commander (usually) with the discretion to dispose of offenses, considering a totality of the circumstances, with the “goal” that the choice be “warranted, appropriate, and fair” (see Discussion to R.C.M. 306(b)).

persuading of the traditional parties to try nontraditional approaches.¹⁹² Additionally, whether such structures afford an acceptable degree of procedural transparency, accountability, and long-term satisfaction may be extremely difficult to predict or assess.¹⁹³ Evaluating such acceptability is further complicated when one tries to assess it from different vantage points, like the commander who triggers the process, the parties undergoing the process, or the unit whose cohesion may be affected one way or the other by the process' outcome. The myriad counterarguments and open questions raised above, in light of just one possible framework for military mediation ("CAMP"), illustrate many of the obvious institutional challenges. The tension between the orthodox and the unconventional may be too great a hurdle.

Rather, the virtues of mediation may be better translated through systemic pedagogy—leadership training and education—than through system design. Strangely, given that mediation is well-known among the practicing bar and well-represented among law school curricula,¹⁹⁴ none of the services in the Armed Forces offer instruction to their Judge Advocate officers, paralegals, or commanders on its potential application or utility to military justice scenarios.¹⁹⁵ The Department of Defense has largely ignored

¹⁹² See Smith & Martinez, et al., *supra* note 12, at 128–29 (proposing a method by which practitioners and academics may evaluate the “quality” of various dispute system designs).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 124, n. 6.

¹⁹⁵ Several military institutions offer training in the related field of negotiation, but do so for areas of law or practice unrelated to military justice. The Air University hosts the U.S. Air Force Negotiation Center of Excellence, which teaches a course on negotiation tactics to Air War College and Air Command and Staff College student officers. The co-located Air Force Judge Advocate General (JAG) School also offers a week-long “Negotiation and Appropriate Dispute Resolution Course” intended to immerse students in Alternative Dispute Resolution processes and skills, though in the limited context of federal labor and employment law, and environmental and acquisition disputes. See Annual Bulletin, The Judge Advocate General’s School Annual, Dickinson Law Center, 2009–2010, available at <http://www.afjag.af.mil/shared/media/document/AFD-090911-069.pdf> (describing the NADRC as part of the Air Force JAG School “Annual Bulletin”), and the 2012 NADRC “Course Announcement,” on file with the author. Similarly, the U.S. Military Academy hosts the West Point Negotiation Project (“WPNP”), and two of its academic departments enroll cadets in negotiation coursework. These academic courses and the umbrella WPNP view the training of future officers in negotiation skills as a critical component of leader development and tactical training, in light of lessons-learned from the extensive reliance on such soft power during

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mediation for its *uniformed* employees, instead focusing its attention to applying mediation and other ADR mechanisms to the field of contract law, or in labor-management grievances, and Equal Employment Opportunity issues.¹⁹⁶

Though lacking in precedent, the teaching of mediation skills in a misconduct context to prospective uniformed neutral third parties—e.g., skills like active listening, facilitative framing of issues, identifying mediation-ripe conflict, understanding differences between a position and interest, articulating areas of consensus, drafting mediated agreements—is not impossible to imagine or overly burdensome. Opportunities to convey and practice these skills exist at various levels: the operational level, where servicing judge advocates might direct the training themselves if they possess academic or experiential knowledge of mediation, or procure mediation experts to deliver the training; or the institutional level, at various resident leadership schools for non-commissioned and commissioned officers, at the Service Academies to collegiate officers-in-training, at the Service-specific JAG courses, or as part of the curricula at Reserve Officer Training Corps (ROTC) programs.¹⁹⁷ Though not a system or procedure, the spread of a mediation skill set would unquestionably find informal venues for application for relational misconduct, especially in combat deployments where traditional formal military justice is often controversial or undesirable because of operational constraints and priorities, and the need for quick, decisive action and sustained unit cohesion are paramount concerns.¹⁹⁸

deployments to Iraq and Afghanistan. See *West Point Negotiation Project*, UNITED STATES MILITARY ACADEMY WEST POINT, <http://www.usma.edu/wpnp/SitePages/Home.aspx>; *Red Book*, STATES MILITARY ACADEMY WEST POINT, http://www.usma.edu/curriculum/RedBook/AY13_RedBook.pdf (listing course offerings by department).

¹⁹⁶ “Conflict Management and Mediation Model,” *supra*, note 52 (discussing the Navy’s civilian employee dispute resolution system and the joint Defense Equal Opportunity Management Institute (DEOMI)).

¹⁹⁷ The author developed and presented such a skill-building workshop and seminar to senior staff at his former brigade headquarters, while deployed in support of Operation Iraqi Freedom 10/Operation New Dawn in 2010. The author developed and subsequently presented a similar workshop and seminar to cadets studying negotiation in two academic departments at the United States Military Academy: the departments of Social Science and Behavioral Science & Leadership, affiliated with the “West Point Negotiation Project,” in 2012. Class notes, curriculum, and materials on file with the author.

¹⁹⁸ For an excellent analysis and empirical study of factors considered by commanders when deploying military justice (as well as legal, cultural, institutional, and logistical complications) to combat zones, see Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW., Sep. 2010, at 12.

Though mediation is indeed different from traditional disciplinary actions and processes, the overarching theme is the same: leadership involved in the day-to-day conduct and relationships between Soldiers. Consequently, mediation—just as any option expressly provided for in the *MCM*—is a process that augments and reinforces the ability to lead Soldiers effectively.

6. *The Redundant Argument: Mediation Encroaches on Equal Opportunity (EO) and Inspector General (IG) Services*

The CAMP scheme is distinguishable from EO. EO programs are designed to maximize fair employment practices and prevent or mitigate the effects of discrimination and harassment based on race, color, religion, gender, and national origin.¹⁹⁹ While there is clear overlap with the CAMP in the sense of improving professional and personal relationships among Soldiers, the CAMP is not limited to the context of unlawful discrimination and workplace harassment. Rather, for command-identified disputes, mediation serves as an alternative tool for promoting good order and discipline, much the same way that an Article 15 or written counseling statement does so without being limited to the context of discrimination and harassment.

The EO experts at units are trained in using multiple resources, techniques, and approaches to resolve interpersonal conflicts, including direct confrontation between the victim and offense, using a third party to act as an arbiter or spokesperson, and referral to the chain-of-command.²⁰⁰ If a complaint is raised through a unit-level EO resource, one additional way to resolve the matter informally could be through mediation. In this way, experts in EO could serve, in appropriate situations, as screeners for cases ripe for mediation. Rather than being redundant, CAMP can be seen as an additional solution for EO conflicts.

For similar reasons, CAMP is distinguishable from IG. The IG serves a complementary, but not analogous, function to dispute mediation. The IG process identifies a problem without pushing it up through the chain-of-command in the same way that self-identified disputes can access neutral mediation under a proposed CAMP. The Army's IG mission has three

¹⁹⁹ AR 600-20, Chapter 6.

²⁰⁰ AR 600-20, ¶ 7-7 and Appendix D.

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objectives: serve as an extension of the commander; serve as a problem-solver; and serve as an impartial fact-finder to resolve individual complaints about fraud, waste, and abuse.²⁰¹ Mediation, in contrast, is designed to provide the disputing parties themselves a platform for identifying the nature of the conflict and for figuring out a way to solve it with a neutral third party. In this way, mediators are not problem-solvers themselves; rather they are problem-crystallizers or discussion-facilitators. Furthermore, mediators are neutral and independent resources for commanders and Soldiers, not an extension of the command team itself.

Finally, mediation itself is not a fact-finding mission. The disputing parties know, or think they know, the nature of their interpersonal conflict but lack either the empathy or willingness needed to resolve it through their own problem-solving attempts. No party is entitled to a discovery phase before or during the mediation. The mediation process itself is a form of “discovery” but is generally less concerned with the *actus reus* and *mens rea* of a particular offense and more with feelings and reactions to interpersonal conduct: the impact or wedge splintering a recoupable relationship. In other words, facts are important as the justifications for or explanations of behavior, but not in the sense of discovering new evidence to use against one or all of the parties as “evidence.”

V. CONCLUSION

Though mediation has never been analyzed as a potential partner to orthodox military justice, it need not be easily dismissed. It is neither logistically implausible, nor contrary to established customary assumptions about the nature of military justice and the proper role of commanders within that system. Instead, mediation demonstrates unquestionable potential under certain (easily-met) conditions: when presented as another application of a commander’s traditional judicial power, when used in the context of resolving relational misconduct that has a disruptive “community effect,” and when the ultimate purpose—weighed against other traditional factors—is to regain or repair unit cohesion. Under those conditions, mediation—whether in a form similar to the model presented here as “CAMP,” or in a less-formal pedagogical practice—offers commanders a viable leadership and preventive law tool that deserves further examination and trial by practice.

²⁰¹ See *Office of the Inspector General*, U.S. DEPARTMENT OF THE ARMY, <http://www.daig.pentagon.mil/>.

Appendix A
MEDIATION OFFER
-COMMANDER'S SCRIPT-
COMMAND-IDENTIFIED DISPUTES

[To Commander: Have the disputing Soldiers report to you individually for this offer. Be receptive to any concerns with mediation identified by the Soldier(s) and be prepared to abort the offer in favor of other recourses (wait; initiate Art 15; impose administrative corrective measures; conduct formal counseling, etc.)]

For each disputing Soldier, read:

RANK, Name, this conference is to inform you that I am offering you and [names of the other disputing Soldiers] a chance to participate in the **Commander's Alternative Mediation Program**. This is not a formal Article 15 reading, nor is it a formal counseling. [*If applicable*] As your commander, I am authorized to initiate or recommend punishment under the UCMJ and the MCM, for the following misconduct:

[Read summary of facts that would support imposing an Art 15: who, what, when, where, relevant UCMJ punitive articles, etc.]

This offer to refer your dispute to mediation is a step *before* this command considers imposition of other discipline, to include Nonjudicial punishment under Article 15. In other words, I have not yet decided to initiate such discipline or pursue other forms of corrective action.

First, let me briefly describe this program:

Mediation is a **closed-door session** with you, [name(s) of other disputing Soldier(s)], and **neutral** mediator from outside this command and sponsored by the Office of the Staff Judge Advocate, [unit higher headquarters]. **No one from this chain-of-command, or this command's legal support team, will participate in the mediation; we will not advise or recommend results to the mediator at any time.** It is simply a chance to sit down for a dedicated time to try to work out your issues, complaints, or grievances with [name(s) of other disputing Soldier(s)] with the help of a trained mediator. The mediator's role is in helping you to discuss and better understand your dispute or conflict, and in helping you determine the best way to resolve it.

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The mediator's function is not to recommend or impose solution on you, or to recommend a solution to me.

The mediation session, if you choose it, will occur at [location]. This command will coordinate with the [Higher HQ OSJA, or office which maintains the pool of mediators] to ensure the session begins no later than 7 calendar days from the day you agree to mediate.

I am offering this mediation alternative because I believe it is in your best interest as you attempt to resolve your dispute. This offer is neither an entitlement nor a required action before this command imposes or initiates administrative and/or punitive actions under the UCMJ.

You have 48 hours to decide whether to accept or reject this offer. During that time, you may consult with counsel from Trial Defense Service, or civilian counsel at no expense to the government. However, because mediation is not an adjudicative procedure—that is, it will not result in a punishment or disciplinary administrative consequence—you are **not entitled** to have counsel present during the mediation session. You may advise me of your choice any time within the 48-hour period.

As commander, I retain the authority to terminate the mediation at any time *prior to the beginning of the mediation session* for good cause shown, or—upon the recommendation of the mediator—*during* the mediation.

Upon prior request and approval from both the mediator and [name(s) of other disputing Soldiers], you may have counsel or other support person present during the mediation. This counsel or support person will not speak for you, nor represent you, at the mediation session.

The mediation session can last as long as you feel comfortable participating in it, with the objective of working toward a written dispute settlement agreement signed by you and [name(s) of the other disputing Soldier(s)]. In other words, there is no time limit on the process. If an agreement is reached, the mediator will draft the written agreement and forward the signed agreement to me.

Subject matter discussed during the session is confidential and will not be disclosed (even to this command) unless all disputing Soldiers and the mediator consent. However, any statement or conduct indicating a threat to

commit, attempt to commit, or actual committing of a crime, or concealing of ongoing criminal activity, automatically waives this rule.

Upon reviewing the agreement, I will ensure that it comports with Army laws and regulations, and promotes military justice in a reasonable effort to resolve your dispute. **As commander, I retain the authority to terminate the Agreement at any time if it fails to meet these goals**, and reconsider initiating UCMJ discipline or administrative corrective measures. I may also offer to refer this case to a new mediator if I believe that the process, if renewed, has a significant chance of achieving an appropriate resolution. I will inform you of my approval or disapproval within 48 hours of receiving the mediation agreement.

If I accept your Agreement, the parties to the Agreement will each maintain a copy, as will I. I retain the authority to brief my chain-of-command, subordinate leaders, and command legal team on the outcome as necessary. No other party, including the mediator, will retain a copy of the Agreement.

Finally, it may helpful to think of mediation as period to “cool off” *while* constructively working to a resolution. If you participate in mediation in good faith, you and [name(s) of other disputing Soldier(s)] have the chance to shape what happens next.

Do you understand that I am offering you this mediation referral because I believe it is in your best interest and the most effective way to resolve your dispute at this time?

Do you understand that I am not ordering you to participate in mediation, and that I’ve made no suggestion that I will impose UCMJ punishment or administrative corrective measures if you choose not to participate or fail to reach a mediated settlement agreement?

Do you understand that any agreement you make with [name(s) of other disputing Soldier(s)] is subject to my final approval?

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Do you understand that participation in mediation is an entirely voluntary choice, and that you have an opportunity to consider what I have said today before making your decision?

Do you wish to make a decision now, or consider this offer further?

[To Commander:]

If they accept the offer immediately, make the same offer to remaining disputing Soldier(s) individually. If they wish to consider the offer further, give them the "Agreement to Mediate" form and instruct them not to sign it until you personally brief them again with the other assenting Soldier(s).

Upon oral agreement to mediate by all disputing Soldier(s) (either at this conference or within 48 hours), reconvene a joint conference with all disputing Soldiers present, and have them read the "Agreement to Mediate." If you are satisfied that each Soldier understands the Agreement and is voluntarily participating, have them sign a single Agreement. Give each Soldier a copy of the signed Agreement to Mediate, and instruct them to standby for the date, time, location of the mediation session, and that it will be their assigned place of duty.

Contact the Commander's Alternative Mediation Program (CAMP) coordinator at ### - ### - ##### to schedule the session. The session should occur within 7 days of the date of the signed "Agreement to Mediate."

Contact the disputing Soldiers and inform them of their appointed place of duty, time, and uniform for the mediation session.

Appendix B



DEPARTMENT OF THE ARMY

HEADQUARTERS, [UNIT]

[Higher unit and Installation]

REPLY TO
ATTENTION OF:

UNIT SYMBOL

DATE

MEMORANDUM FOR RECORD

SUBJECT: Agreement to Mediate

1. The undersigned Soldiers hereby:

a. Agree to participate in command-referred mediation, known as the Commander's Alternative Mediation Program; the undersigned Soldiers enter into this "Agreement to Mediate" voluntarily, and have not been coerced, pressured, or intimidated in any manner in making this decision.

b. Acknowledge that no one from this chain-of-command, or this command's legal support team, will participate in the mediation, and will not advise or recommend results to the mediator at any time regarding our dispute.

c. Acknowledge having received individual, personal briefings by a commander authorized to impose nonjudicial punishment under Article 15, UCMJ, and were provided with 48 hours to consider the offer of a mediation referral.

d. Acknowledge that there is no entitlement to mediation, or to receive an offer to mediate, as a prerequisite to command-directed administrative or punitive actions concerning the facts of this conflict or dispute.

MILITARY MEDIATION AS MILITARY JUSTICE?

e. Acknowledge that there is no entitlement to consulting or representative counsel for this mediation, and that any request to have counsel or a support person present during the mediation must be approved by the mediator and all disputing parties in advance.

f. Understand that any mediated Agreement will comport with Army policies, regulations, and the UCMJ, and will represent a reasonable effort to resolve our dispute; we acknowledge that the undersigned commander is final approving authority for the terms of the mediated Agreement, if any.

g. Acknowledge that any mediated Agreement does not restrict, limit, or otherwise confine the undersigned commander's authority to terminate the Agreement for good cause and initiate punitive or administrative corrective measures.

h. Understand that the subject matter discussed during the mediation session is confidential and will not be disclosed without written consent by all parties, including the mediator.

i. Acknowledge that no party to this dispute may be forced to enter into a mediated settlement Agreement, and that failure to arrive at a mediated settlement Agreement does **not** automatically trigger administrative or punitive action by the command.

2. **This "Agreement to Mediate" shall not be construed or interpreted as a legally-enforceable contract between or among the undersigned Soldiers and commander.** However, failure by disputing Soldier(s) to adhere to this Agreement to Mediate in good faith may reflect adversely on an ability or willingness to resolve this dispute and—as a consequence—may be used by the commander in future evaluation and disposition of the facts underlying this dispute.

3. **Any mediated settlement Agreement entered into by the parties during the mediation session, regardless of commander approval, shall not be construed or interpreted as a legally enforceable contract between or among the signatories.** However, failure by one or more of the disputing Soldier(s) to adhere to the terms contained therein may be used by the commander in future evaluation and disposition of the facts underlying this dispute.

[If more signature blocks are needed, handwrite below]

Print NAME, RANK: _____

SIGNATURE: _____

DATE: _____

Print NAME, RANK: _____

SIGNATURE: _____

DATE: _____

Signature

Name

Rank, Branch

Commanding

MILITARY MEDIATION AS MILITARY JUSTICE?

Appendix C



DEPARTMENT OF THE ARMY

HEADQUARTERS, [UNIT]

[Higher unit and Installation]

REPLY TO
ATTENTION OF:

OFFICE SYMBOL

MEMORANDUM FOR RECORD

SUBJECT: Mediated Agreement

1. The undersigned Soldiers hereby agree (enumerate each specific agreement below):

2. The undersigned Soldiers hereby understand, acknowledge, and agree that:

a. The undersigned Soldiers entered into this "Mediation Agreement" voluntarily, and have not been coerced, pressured, or intimidated in any manner in making this Agreement.

b. No one from this chain-of-command, or this command's legal support team, participated in the mediation, and did not advise or recommend results to the mediator at any time regarding our dispute to the best of our knowledge.

c. To the best of our knowledge, this Agreement comports with Army polices, regulations, and the UCMJ, and represents a reasonable effort to resolve our dispute; we acknowledge that the referring commander is final approving authority for the terms of this mediated Agreement.

d. This Agreement does not restrict, limit, or otherwise confine the referring commander's authority to terminate this Agreement for good cause and initiate punitive or administrative corrective measures.

e. **This Agreement, regardless of commander approval, shall not be construed or interpreted as a legally-enforceable contract between or among the signatories and referring commander** and that failure by one or more of the undersigned Soldier(s) to adhere to the terms contained therein may be used by the commander in future evaluation and disposition of the facts underlying this dispute.

[If more signature blocks are needed, handwrite below]

Print NAME, RANK: _____

SIGNATURE: _____

DATE: _____

Print NAME, RANK: _____

SIGNATURE: _____

DATE: _____

[FULL NAME], Mediator
[Rank, Branch]

Date